

LAW OF SUCCESSION IN SOUTHERN NIGERIA WITH  
SPECIAL REFERENCE TO THE MID-WESTERN REGION

being a

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by

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## ABSTRACT

This work treats of both the general law and the customary law of succession in southern Nigeria, with special reference to the newly established Mid-Western Region.

The rules of the various systems of the customary law of succession of the peoples inhabiting our area of special reference - the Mid-Western Region - have been examined in defined patterns; although the opportunity has also been taken to point out instances of local variations occurring within the patterns, as well as those of similarities existing between systems dealt with in different patterns.

The work is in five parts. Part One gives an outline of the legal system of the Mid-Western Region, including a brief sketch of certain topics - the creation of the Region, its position, extent and peoples - serving, as it were, as a background for an intelligent understanding of the legal system.

Part Two deals with the general law. Chapter Two contains a brief account of the law relating to the administration of estates; while Chapters Three and Four examine the effect of a Christian or monogamous marriage on intestate succession.

Part Three is concerned with the process of the administration of estates under customary law in southern Nigeria generally. Chapter Five gives an account of the performance of the burial and funeral ceremony of the deceased, and the connexion between the performance of this ceremony and the succession to his estate. Chapter Six deals with the customary administrator, including his appointment, rights, duties, powers and liabilities.

Part Four is devoted almost exclusively to an examination of the various customary law rules of distribution observed by the different ethnic groups occupying the Mid-Western Region. In this part also, the rights and duties of the heir as well as those of a guardian are considered.

Part Five covers testate succession. Chapter Thirteen deals with wills, gifts inter vivos and donationes mortis causa governed by the customary law. Chapter Fourteen discusses the general law of wills, i.e. wills in English form; and examines the purposes for which the machinery offered by the English Wills Acts has been employed by the Nigerian testator. The chapter concludes with suggestions regarding the enactment of legislation to deal with two aspects of the law of wills. One recommends that

an attempt should be made to effect either complete integration or harmonization of certain requirements of the general law and the customary law relating to wills. The other calls for the placing of some restrictions on the testamentary powers of the deceased, or more precisely, family provision.

A word must be said concerning the method used in collecting some of the materials presented in this work. Apart from several hitherto <sup>?</sup>untouched publications, bearing on the Mid-Western Region, which have been presented here, there has been oral information collected on the spot from chiefs and other persons versed in the customary law in the Region. Their help in this connexion has been duly acknowledged at the appropriate pages of this thesis.

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G.L.R.	..	..	Ghana Law Reports.
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N.L.R.	..	..	Nigeria Law Reports.
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P.C.1874-1928	..		Privy Council Judgements, 1874-1928.
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W.A.C.A.	..	..	Selected Judgements of the West African Court of Appeal.
W.A.L.R.	..	..	West African Law Reports.
W.N.L.R.	..	..	Western Nigeria Law Reports.

TABLE OF CONTENTS

	<u>Page</u>
Abstract .....	ii
Acknowledgements .....	v
Modes of citation of West African Law Reports .....	vii
Table of Nigerian statutes .....	xvii
Table of Imperial statutes .....	xxii
Table of cases .....	xxv
Bibliography .....	528

PART ONEINTRODUCTIONCHAPTER ONETHE LEGAL SYSTEM OF THE MID-WESTERN REGIONBackground

The creation of the Region .....	1
Position, size and peoples of the Region .....	3
The judicial system and laws administered by the courts of the Region.....	7
Types of laws governing succession in the Region .....	19
The appropriate court in which suits relating to succession may be commenced .....	21

PART TWOGENERAL LAW RELATING TO ADMINISTRATION AND INTESTATE SUCCESSIONCHAPTER TWOADMINISTRATION OF ESTATES

1. Courts exercising jurisdiction in suits relating to ad- ministration in southern Nigeria .....	25
2. Law applied by the courts .....	26
(a) The Federal Territory of Lagos and the Eastern Region .....	26
(b) The Western and the Mid-Western Regions .....	27
3. Areas where local Acts and Laws apply .....	28
(a) Acts applying throughout southern Nigeria .....	29

(b) Acts applying only to the Federal Territory of Lagos .....	32
(c) Laws applying only in the Western, Mid-Western and Eastern Regions .....	49

### CHAPTER THREE

#### THE EFFECT OF A CHRISTIAN OR MONOGAMOUS MARRIAGE ON INTESTATE SUCCESSION

##### SUCCESSION GOVERNED BY THE PROVISIONS OF THE MARRIAGE ACT

Definition of a Christian or monogamous marriage .....	52
The provisions of section 36 of the Marriage Act .....	55
Area of application .....	57
Basis of application .....	60
Date for the application of the relevant English law referred to in section 36 of the Marriage Act .....	64
Persons to whose succession section 36 of the Marriage Act applies .....	80
The meanings of the words 'children' and 'widow' under section 36 of the Marriage Act .....	83
'Children' and 'widow' under the Statutes of Distribution, as interpreted by the courts .....	84
Property to which section 36 of the Marriage Act applies .....	98
Scheme of distribution under the relevant English law incorporated in section 36 of the Marriage Act .....	101

### CHAPTER FOUR

#### THE EFFECT OF A CHRISTIAN OR MONOGAMOUS MARRIAGE ON INTESTATE SUCCESSION

##### (CONTINUED): SUCCESSION NOT GOVERNED BY THE PROVISIONS OF THE MARRIAGE ACT

Where section 36 of the Marriage Act is inapplicable, notwithstanding the intestate's Christian or monogamous marriage ....	106
The position in the Eastern Region .....	108
The position in the Western and the Mid-Western Regions ...	122
When the courts may apply the rules of the customary law in respect of the succession of persons contracting a Christian or monogamous marriage .....	137
Succession to non-natives contracting a Christian or monogamous marriage .....	145
The Federal Territory of Lagos and the Eastern Region .....	145
The Western and the Mid-Western Regions .....	146
Partial intestacy .....	147
The Federal Territory of Lagos and the Eastern Region .....	148
The Western and the Mid-Western Regions .....	148



### PART THREE

#### ADMINISTRATION OF ESTATES UNDER CUSTOMARY LAW

##### CHAPTER FIVE

##### ADMINISTRATION OF ESTATES

Burial and funeral .....	150
Responsibility for the payment of the burial and funeral expenses .....	156
Legal relevance of the performance of the burial and funeral rites .....	162
Failure to participate in the performance of the burial and funeral rites .....	166

##### CHAPTER SIX

##### ADMINISTRATION OF ESTATES (CONTINUED)

##### THE ADMINISTRATOR - APPOINTMENT, RIGHTS, DUTIES, POWERS AND LIABILITIES

The appointment of the customary administrator .....	176
Appointment by the family of the deceased .....	176
Nomination by the deceased himself .....	180
Appointment by court .....	
The Federal Territory of Lagos .....	183
Proof of the customary law relied upon by prospective administrator .....	189
Appointment by the customary court .....	
Western and Mid-Western Regions .....	191
Proof of customary law in the customary court .....	195
The Eastern Region .....	212
Legal position of the authority granted to the administrator by the customary court .....	215
Vesting of the estate between time of death and when the administration is granted .....	221
Duties and powers of the administrator .....	225
Duration of the period of administration .....	240
Rights of the administrator .....	241
Liabilities of the administrator .....	242

### PART FOUR

#### CUSTOMARY LAW IN THE MID-WESTERN REGION

##### CHAPTER SEVEN

##### DISTRIBUTION OF ESTATES

## (CHAPTER SEVEN)

CLASSIFICATION OF THE VARIOUS SYSTEMS OF SUCCESSION FOUND IN THE REGION,  
INCLUDING CONSIDERATION OF SOME GENERAL PRINCIPLES GOVERNING DISTRIBUTION

Scope of inquiry .....	246
Main patterns of succession in the Mid-Western Region .....	247
The heir or successor .....	249
Classes of .....	255
Ascertainment of .....	257
The estate .....	259
Assets .....	259
The position of widows .....	262
Liabilities .....	275
Time for the distribution of the estate .....	
Machinery of distribution of the estate .....	
The seniority of children .....	

CHAPTER EIGHT

RULES OF DISTRIBUTION IN TYPE "A" SOCIETIES - ISHAN AND HOLDERS OF  
HEREDITARY TITLES AMONG THE BINI

1. The estate of a married man survived by male issue .....	282
The principle of primogeniture .....	285
Failure on the part of the sole heir to perform the burial and funeral ceremony of his deceased father ....	288
The position of the deceased's younger sons .....	289
Principle of representation .....	290
The deceased's widows .....	291
Ceremony marking the taking over of the widow .....	294
2. The estate of a married man without male issue .....	295
When eldest daughter may be a successor - the Ishan <u>arebhwa</u> .....	297
Rights of the ruler - Oba or <u>onogie</u> .....	298
Who are a man's children? .....	299
The posthumous child: rights of inheritance .....	302
The attitude of the court to the customary law governing legal paternity .....	303
3. The estate of a married woman .....	305
Rights of her family v. those of her husband .....	305
4. The estate of an unmarried person .....	307

CHAPTER NINERULES OF DISTRIBUTION IN TYPE "B" SOCIETIES - IBO AND IVBIOSAKON

1.	The estate of a married man survived by children born by one wife .....	308
	The deceased's widow .....	310
2.	The estate of a married man survived by children born by different wives .....	310
	The rights of the eldest son .....	312
	When a daughter may inherit as a son - the Ibo custom of <u>idegbe</u> ( <u>idebwe</u> ) .....	313
	The deceased's widows .....	315
	Ceremony marking widow-marriage .....	317
	Who are a man's children? .....	317
	A woman's children .....	320
	Woman-to-woman marriage: affiliation of children of such marriage .....	320
	Judicial attitude to the customary law governing legal paternity .....	321
	The posthumous child: rights of inheritance .....	324
	Principle of representation .....	325
3.	The estate of a married man leaving no male issue .....	327
	When a relative older than the deceased may be heir ...	329
	Where remoter relatives were born of different mothers.	330
	Where there are no visible blood relatives ,.....	330
4.	The estate of a married woman .....	331
5.	The estate of an unmarried person .....	333
	System of matrilineal succession absent among the Ibo of the Mid-Western Region .....	334

CHAPTER TENRULES OF DISTRIBUTION IN TYPE "C" SOCIETIES - AKOKO-EDO, BINI,

[i.e. the majority of the Benin people, not being holders of hereditary titles.] ISOKO, ITSEKIRI AND URHOB

	General remarks .....	336
1.	The estate of a married man survived by children born by one mother .....	338
	Rights of children .....	339
	The posthumous child .....	348
	Other relatives .....	349
	The deceased's widow .....	353
	Ceremony marking the taking over of the widow .....	355
2.	The estate of a married man survived by children born of different mothers .....	355
	The deceased's widows .....	357

## (CHAPTER TEN)

Principle of representation .....	358
Who are a man's children? .....	359
3. The estate of a married man leaving no children .....	363
Rights of the ruler .....	366
4. The estate of a married woman .....	366
Where there are no surviving children .....	367
5. The estate of an unmarried person .....	367

CHAPTER ELEVENRULES OF DISTRIBUTION IN TYPE "D" SOCIETIES - ETSAKO AND IJAW

Scope .....	369
(A) Rights of children in respect of their deceased father's estate .....	370
1. Where he married under the "big dowry" system ( <u>amoya</u> , <u>braere</u> , or <u>ya</u> ) .....	373
2. Where he married under the "small dowry" system ( <u>isomi</u> , <u>ekiere</u> , or <u>egwa</u> ) .....	376
(B) Rights of children in respect of their deceased mother's estate .....	378
1. Where she is not survived by children .....	379
(a) The estate of a woman married under the "big dowry" system .....	379
(b) The estate of a woman married under the "small dowry" system .....	379
The Ijaw of Kabowei (Patani) .....	380
Some modern developments .....	380
1. Modification of the system of marriage .....	381
2. The inheritance rights of children in respect of their father's estate .....	382

CHAPTER TWELVERIGHTS AND DUTIES OF THE HEIR

Scope of inquiry .....	385
Duties .....	386
(1) Burial and funeral of the deceased .....	387
(2) Worship of the deceased as an ancestor .....	389
Influence of the Christian and other religions on the cult of ancestors .....	390
(3) Payment of the debts owed by the deceased .....	394
(4) Maintenance of the dependants of the deceased .....	398
(a) Widows .....	398
The widower .....	402

## (CHAPTER TWELVE)

(b) Children and others to whom the deceased stood in <u>loco parentis</u> .....	402
The rights of the heir .....	404
Rights of the heir over inherited property compared with his rights in respect of his self-acquired or individual property.	405
Where the heir is a minor: guardianship over him .....	412
Rights and duties of guardian .....	413

PART FIVETESTATE SUCCESSIONCHAPTER THIRTEENTESTATE SUCCESSION UNDER CUSTOMARY LAW

Powers of the <u>propositus</u> to affect succession to his estate ..	424
(1) Gifts <u>inter vivos</u> .....	424
(2) Nuncupative or oral will .....	424
(3) <u>Donatio mortis causa</u> .....	424
Dispositive succession .....	424
Role of testate succession .....	425
(1) Gifts <u>inter vivos</u> .....	426
Proof .....	427
Essential elements .....	429
(2) Nuncupative or oral wills .....	432
Essential requirements .....	434
Effect of a nuncupative will .....	
(a) When it takes effect .....	438
(b) The attitude of the testator's family .....	438
Failure of gifts .....	
(a) Revocation .....	440
(b) Ademption .....	441
(c) Lapse .....	441
(d) Disclaimer .....	442
The effect of reducing a nuncupative will into writing..	442
Admission of written customary wills to probate .....	
(a) The Federal Territory of Lagos .....	443
(b) The Eastern Region .....	444
(c) The Western and the Mid-Western Regions .....	446
The position of a written customary will in a customary court .....	447
(a) The Western and the Mid-Western Regions .....	447
(b) The Eastern Region .....	448
(3) <u>Donatio mortis causa</u> .....	448
Limitations on the powers of the deceased to effect disposi- tions of his property .....	450
(1) Nature of property involved .....	451
(2) Disharison .....	453

CHAPTER FOURTEENTESTATE SUCCESSION UNDER THE GENERAL LAW OR WILLS IN ENGLISH FORM

The reception of the Wills Acts in southern Nigeria .....	456
(1) The Federal Territory of Lagos and the Eastern Region ...	457
(2) The Western and the Mid-Western Regions .....	458
The provisions of the Wills Law (Western Region) recognising	
some rules of customary law .....	459
(a) Indisposability of certain forms of property .....	459
(b) The effect of a customary marriage on a will .....	460
The position of gifts to wife or husband of attesting	
witness .....	461
The requirements of a valid will under the general law .....	
Scope .....	462
Distinction between the validity of a will and the validity of	
the dispositions contained therein .....	463
Importance of this distinction in southern Nigeria .....	465
Purposes for which property has been given by testators in	
southern Nigeria .....	466
Problems of construction .....	467
Interests created by wills .....	
1. Interests strictly known only to English law - trusts...	469
(a) Private trusts .....	471
(b) Charitable trusts .....	474
The estate tail .....	479
2. Interests strictly known only to customary law - family	
property .....	481
Definition of family property .....	482
Construction of the word "family" in wills creating	
family property .....	483
Expressions necessary for the creation of family	
property .....	484
Where the intention to create family property may	
be collected from the will .....	487
Subject-matter of family property .....	490
Wills creating both trusts and family property .....	491
Role of the trustee in the institution of family property	493
Position of the head of the family where trustees are	
appointed in respect of family property .....	495
Reasons behind the creation of family property by wills .....	499
3. Interests known to both English law and customary law -	
gift or legacy .....	507
Future policy in regard to wills in southern Nigeria .....	513
(1) Customary wills .....	514
(2) Wills in English form .....	515
(3) Family provision .....	516
Relevant legislation in Malawi .....	516

APPENDICESAPPENDIX I

Map of the Mid-Western Region of Nigeria .....	520
--	-----

APPENDIX II

A. Suit No.GBC/5E/60: Fregene, In re - certified true copy of proceedings .....	521
B. Suit No.2/61: Ziregbe, In the Estate of - certified true copy of proceedings .....	523
C. Suit No.1084/59: Ochonma v. Ochonma - certified true copy of proceedings .....	526

TABLE OF STATUTESNIGERIA

<u>No. and Year</u>	<u>Subject-matter</u>	<u>Pages</u>
1863, Ord. No.3	Ordinance applying the laws of England to the Settlement of Lagos	70,456
1863, Ord. No.10	Ordinance for the granting of licences for marriages in the Settlement of Lagos	65-6
1863, Ord. No.21	Ordinance for the registration and solemnization of marriages in the Settlement of Lagos	66
1876, Ord. No.4	Supreme Court Ordinance	132, 456
1884, Ord. No.14	Marriage Ordinance	65-7,69,87
1900, P.No.4	Protectorate Courts Proclamation	456
1906, Ord. No.17	Supreme Court Ordinance	456
1914, Ord. No.6	Supreme Court Ordinance	456,480,498-9
1943, Ord. No.23	Supreme Court Ordinance	142,119

1948 edition

Cap.211	Supreme Court Ordinance	74-5
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SUBSIDIARY LEGISLATION

Cap.211	Supreme Court (Civil Procedure) Rules	74,79-80,187-8
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FEDERATION OF NIGERIA AND LAGOS1958 edition

Cap.1	Administration (Foreign Employment) Act	27,29-31
Cap.2	Administration (Real Estates) Act	27,32-4,184-5
Cap.3	Administration of Estates by Consular Officers Act	27,29,31-2
Cap.4	Administrator-General's Act	27,34-51,185



<u>No. and Year</u>	<u>Subject-matter</u>	<u>Pages</u>
Cap.42	Criminal Code	52,227,243
Cap.62	Evidence Act	91,190,204,304, 321
Cap.80	High Court of Lagos Act	25-6,72-4,79-81, 119,132,185-6, 188,222-3,458, 498
Cap.89	Law (Miscellaneous Provisions) Act	29,52,71,80-1, 109,456
Cap.103	Legitimacy Act	52,87,92
Cap.113	Magistrates' Court (Lagos) Act	25,81,185-6,498
Cap.115	Marriage Act	52-73,80,82-100, 106-7,110,115- 124,128-130,141- 2,145,270
1961, No.57	Designation of Ordinances Act	16-17,184
1963, No.19	Mid-Western Region (Transitional Provisions) Act	2,9,11-13,17
1963, No.20	Constitution of the Federation of Nigeria	2,9-10,25,59
1964, No.1	Interpretation Act	29,52,71,81,480
1964, No.3	Constitution of Mid-Western Nigeria Act	3,5,9-12,14,17
<u>SUBSIDIARY LEGISLATION</u>		
Cap.189	Judgements (Enforcement) Rules	480
1963, L.N.96	Mid-Western Nigeria Act (1962) (Appointed Day) Order	2
1964, L.N.7	Constitution of Mid-Western Nigeria Act (Commencement) Order	3,9,11-14
<u>WESTERN AND MID-WESTERN REGIONS</u>		
1955, Law No.5	Magistrates' Courts Law	219-220
<u>1959 edition</u>		
Cap.1	Administration of Estates Law	20-1,27,50-1,60, 123-8,130,146-9, 221-2,249-50,458
Cap.2	Administrator-General's Law	20-1,28,50,221-2

<u>No. and Year</u>	<u>Subject-matter</u>	<u>Pages</u>
Cap.24	Communal Land Rights (Vesting in Trustees) Law	16-17
Cap.28	Criminal Code	52,227,243,417
Cap.31	Customary Courts Law	21-2,192-3,199,203, 205,303-4,321,447,525
Cap.44	High Court Law	16,18,21-4,26,119, 132,217,220,303-4,321, 446,459,498
Cap.51	Interpretation Law	29,52,461
Cap.60	Law of England (Application) Law	457
Cap.62	Legitimacy Law	20,52,87
Cap.64	Limitation Law	227,394,396
Cap.68	Local Government Law	16,19
Cap.74	Magistrates' Courts Law	21,23-4,186-7,220-1, 303-4,321,498
Cap.100	Property and Conveyancing Law	250
Cap.113	Road Traffic Law	16,18
Cap.116	Sheriffs and Civil Process Law	17
Cap.133	Wills Law	20,456,458-9,460-1
1959,W.R.34	Customary Courts (Amendment) Law	21-2,192-3,447
<u>SUBSIDIARY LEGISLATION</u>		
1958,W.R.L.N. 258 (cap.31)	Customary Courts Rules	15,21
1958,W.R.L.N. 456	Marriage, Divorce and Custody of Children Adoptive Bye-Laws Order	268
1959,W.R.L.N.2	Judicial Divisions Directions	14
1959,W.R.L.N. 139	Magisterial Districts Directions	14
1959,W.R.L.N. 260	Customary Courts (Amendment No.2) Rules	15,193
1960,W.R.L.N. 227	Parliamentary Electoral Regulations	3,14
1960,W.R.L.N. 239	Customary Court Members (Conditions of Service) Regulations	15

<u>No. and Year</u>	<u>Subject-matter</u>	<u>Pages</u>
1962,W.N.L.N.1	Judicial Divisions Directions	14
1962,W.N.L.N.317	Customary Courts (Amendment) Rules	16
<u>MID-WESTERN REGION</u>		
1964, M.N.L.N.5	Communal Land Rights (Vesting in Trustees)(Amendment) Law	17
1964,M.N.L.N.6	Local Government (Amendment) Law	19
1964, M.N.L.N.8	Road Traffic (Amendment) Law	19
<u>SUBSIDIARY LEGISLATION</u>		
1964,M.N.L.N.1	High Court of Mid-Western Nigeria (Appointed Day) Order	14
1964,M.N.L.N.23	Magisterial Districts Directions	15
1964,M.N.L.N.24	Judicial Divisions Directions	14
1964,M.N.L.N.48	Judicial Divisions (Amendment) Directions	14
1964,M.N.L.N.66	Judicial Divisions (Amendment No.2) Directions	14
1964,M.N.L.N.88	Judicial Divisions (Amendment No.3) Directions	14
1964,M.N.L.N.89	Customary Courts (Amendment) Rules	15
1964,M.N.L.N.92	Customary Court Memmbers (Condi- tions of Service)(Amendment) Regulations	15-16
<u>EASTERN REGION</u>		
1955,No.10	Magistrates' Courts Law	25,108-9,115,186-7, 220,456,498
1955, No. 27	High Court Law	25-6,108-9,115,119,132, 217,220-3,444-5,456, 458,498

<u>No and Year</u>	<u>Subject-matter</u>	<u>Pages</u>
1956, No. 21	Customary Courts Law	213, 448
1956, No. 23	Limitation of Dowry Law	371, 382
1957, No. 12	Customary Courts (Amendment) Law	213
1960, No. 11	Interpretation Act (Amendment) Law	29
1961, No. 17	Administrator-General Law	28, 50-1

TABLE OF IMPERIAL STATUTES

<u>No. and Year</u>	<u>Subject-matter</u>	<u>Pages</u>
1670, 22 & 23 Car.2, c.10	Statute of Distribution	69,72,84-8,95-7,101-3,105, 108,115,146,148,249
1670, 22 & 23 Car.2, c.20	An Act for the Relief and Release of Poor Distressed Prisoners for Debt	69
1677, 29 Car.2, c.3	Statute of Frauds	72,104,115,146
1685, 1 Jac.2, c.17	Statute of Distribution	69,72,84-8,95-7,101-2,105, 108,115,146,148,249
1833, 3 & 4 Will.4,c.105	Dower Act	110-111,146,148
1833, 3 & 4 Will.4,c.106	Inheritance Act	108,110,112-114,142,146, 148,249
1837, 7 Will.4 & 1 Vict.,c.26	Wills Act	122,455,457-8,466-7
1846, 9 & 10 Vict.,c.93	Fatal Accidents Act	93,215
1852, 15 & 16 Vict., c.24	Wills Act Amendment Act	122,455,457-8,466-7
1857, 20 & 21 Vict., c.85	Matrimonial Causes Act	104
1859, 22 & 23 Vict.,c.35	Lord St. Leonard's Act	110,114,146
1864, 27 & 28 Vict., c.95	Fatal Accidents Act	93,215
1890, 53 & 54 Vict., c.29	Intestates Estates Act	72,105,115,146,148
1893, 56 Vict., c.5	Regimental Debts Act	46-9
1918, 7 & 8 Geo.5,c.58	Wills (Soldiers & Sailors) Act	458

<u>No. and Year</u>	<u>Subject-matter</u>	<u>Pages</u>
1925, 15 Geo.5, c.20	Law of Property Act	250
1925, 15 Geo.5, c.23	Administration of Estates Act	27-8, 50, 70, 123, 125, 222, 250
1925, 15 & 16 Geo.5, c.49	Supreme Court of Judicature (Consolidation) Act	26, 74-5, 79-80
1950, 14 Geo.6, c.25	Matrimonial Causes Act	104
1952, 15 & 16 Geo.6 & 1 Eliz 2, c.10	Intestates' Estates Act	70, 123
1953, 1 & 2 Eliz.2, c.24	Navy and Marines (Wills) Act	458-9
1960, 8 & 9 Eliz 2, c.55	Nigeria Independence Act	10

#### IMPERIAL ORDERS IN COUNCIL

1913, S.R. & O.	The Colony of Nigeria Boundaries Order in Council	57
1954, S.I.1146	Nigeria (Constitution) Order in Council	57
1960, S.I.1652	Nigeria (Constitution) Order in Council	10

#### GHANA

##### 1951 edition (Gold Coast)

Cap.127	Marriage Ordinance	54-5, 64, 96-7
---------	--------------------	----------------

#### MALAWI

1964, No.36	The Wills and Inheritance (Kamuzu's Mbumba Protection) Ordinance	516-518
-------------	--	---------

ZAMBIA

xxiv

No. and Year

Subject-matter

Pages

1964 edition

Cap.3

High Court Ordinance

76,77,78

Cap.11

English Law (Extent of Applica-  
tion) Ordinance

77

TABLE OF CASES

Ababio II v. Nsemfoo (1947) 12 W.A.C.A.127	199-201, 203, 206-7
Abasi v. Kopon and ors. (1921) 5 N.L.R.61	471-3, 505
Adadevoh and ors., Re (1951) 13 W.A.C.A.304	68, 85-6, 95-6, 136
Adagun v. Fagbola (1932) 11 N.L.R.10	190
Adedibu v. Adewoyin (1951) 13 W.A.C.A. 191	190
Adedoyin v. Simeon and ors. (1928) 9 N.L.R.76	508-9
Adegbola v. Folaranmi and ors. (1921) 3 N.L.R.89	134-5, 137
Adelabu and anor. v. Inspector-General of Police [1955-6] W.N.L.R.7	57
Adeoye v. Adeoye [1961] All N.L.R.792; 1962 N.R.N.L.R.63	44, 62
Adeseye and ors. v. Taiwo and ors. (1956) I F.S.C.84	190
Adeyemi v. Adeyemi [1962] L.L.R.70	44, 62
Agboruja, In the Estate of (1949) 19 N.L.R.38	254, 263, 265, 267, 270, 273, 354-5, 402
Aileru and ors. v. Anibi (1952) 20 N.L.R.46	182
Ajayi v. White (1946) 18 N.L.R.41	141-2
Ajobi and anor. v. Oloko and ors. [1959] L.L.R.152	190
Ajoke v. Olateju [1962] L.L.R.139	423
Alake and anor. v. Awawu 11 N.L.R.39	429
Alake v. Halid and anor. (1935) 12 N.L.R.22	427, 473, 509-11
Alake v. Pratt (1955) 15 W.A.C.A.20	88-9, 91-4, 136
Amachree v. Goodhead (1923) 4 N.L.R.101	322-4
Angu v. Attah (1916) P.C. (Gold Coast) 1874-1928, 43	190-1, 200-1
Apatira and anor. v. Akanke and ors. (1944) 17 N.L.R.149	455
Aragba and ors. v. Akanji and ors. [1960] W.N.L.R. 92	212, 217
Archibong and ors. v. Archibong (1947) 18 N.L.R.117	469
Asiata v. Goncallo (1900) 1 N.L.R.42	137-9, 141, 144
Attorney-General of Eastern Nigeria v. Attorney- General of the Federation of Nigeria Suits Nos.231 and 232/1964 (unreported) decided by the Supreme Court of Nigeria	4
Attorney-General of Southern Nigeria v. John Holt and Co. Ltd. (1910) 2 N.L.R.1	109



Ayeni v. Miller Bros. (1924) 5 N.L.R.42	485
Ayinke and anor. v. Ibidunmi (1959) IV F.S.C.280	469
Ayoola v. Folawiyo (1942) 8 W.A.C.A.39	504,506
Bacon's Wills, Re (1886) 31 Ch.D.460	103
Bajulaiye and anor. v. Akapo (1938) 14 N.L.R.10	500
Balogun and anor. v. Balogun and ors. (1934) 2 W.A.C.A.290	467-8, 487, 491-2, 494-9, 502-4, 506
Balogun v. Oshodi (1929) 10 N.L.R.36	190
Bamgbose v. Daniel (No.1) (1954) 14 W.A.C.A.111	86-7
Bamgbose v. Daniel (No.2) (1954) 14 W.A.C.A.116; [1954] 3 All E.R.263; [1955] A.C.107	69,83,87-8,94,122,136,
Bamgboye v. Administrator-General (1954) 14 W.A.C.A.616	34
Bankole and anor. v. Tapo [1961] All N.L.R.140	429
Banks v. Goodfellow (1870) L.R.5 Q.B.549	435-6
Bannister v. Bannister [1948] 2 All E.R.133	143
Barnett's Trusts, Re [1902] 1 Ch.847	104
Beaumont, Re [1902] 1 Ch.889	424
Berthiaume v. Dastous [1930] A.C.79	129
Bickersteth and anor. v. Shanu [1936] A.C.290	511-513
Blackborough v. Davies (1701) 1 P.Wms.41	102
Branco and ors. v. Johnson (1943) 17 N.L.R.70	473
Briggs v. Briggs (1957) II E.N.L.R.6	220,445
Buraimo v. Gbamgboye (1940) 15 N.L.R.139; 7 W.A.C.A.69	190
Cain v. Moon [1896] 2 Q.B.286	450
Caulcrick v. Harding and anor. (1926) 7 N.L.R.48	98-9
Coker v. Coker and ors. (1938) 14 N.L.R.83	483,486,505
Coker and ors. v. Coker and anor. (1943) 17 N.L.R.55	118,133
Cole v. Akinyele and ors. (1960) V F.S.C.84	90-3, 136,190, 304, 321
Cole v. Cole (1898) 1 N.L.R.15	109, 118, 121-2, 131-8, 140, 144
Coleman v. Shang [1959] G.L.R.390	96-7
[1961] A.C.481; [1961] 2 All E.R.406	96-7

Crook v. Brooking (1688) 2 Vern.50	143
Dosunmu v. Dosunmu (1954) 14 W.A.C.A.427	401
Edet v. Essien (1932) 11 N.L.R.47	304-5, 372
Edokpolor v. Idehen [1961] W.N.L.R.11	197-9, 202, 204-5, 284
Edun v. Koledoye and ors. (1954) 14 W.A.C.A.642	224
Ehigie v. Ehigie [1961] All N.L.R.842; [1961] W.N.L.R.307	170-1, 199, 201-5, 254-5, 283-5, 288-9, 387, 402-3, 409-10
Emodie, In re, Administrator-General v. Egbuna and ors. (1945) 18 N.L.R.1	115-121
Etim and ors. V. Ekpri and ors. (1941) 16 N.L.R.43	452
Ettarh v. Ettarh (unreported) Suit No.HD./23/63, High Court of Lagos	44, 62
Fahm v. Ogbojologun and anor. (1935) 12 N.L.R.47	190
Federal Administrator-General v. Johnson and anor. [1960] L.L.R.290	444
Fijabi v. Odumola [1955-6] W.N.L.R.133	196-7, 206
Flynn and ors. v. Gardiner (1953) 14 W.A.C.A. 260	224
Forster, In re, Coker v. Coker and ors. (1938) 14 N.L.R.83	483, 486, 505
Fowler v. Martins (1924) 5 N.L.R.45	66
Fregene, In re Suit GBC/5E/60 (unreported), Warri Divisional grade "B" customary court	194, 207-9, 211, 521-2
George v. Administrator-General and anor. (1955) 21 N.L.R.83	190
George and anor. v. Fajore (1939) 15 N.L.R.1	488-9, 504
Giwa and ors. v. Erinmolokun [1961] All N.L.R.294	191
Goodings v. Martins (1942) 8 W.A.C.A.108	136
Griggs, Re [1914] 2 Ch.547	33
Haastруп v. Coker (1927) 8 N.L.R.68	143-4
Hotonu, In re (1892) R.C.J.18	243
Hyde v. Hyde and Woodmansee (1866) L.R.1 P. & D.130	53

Idowu and anor. v. Adisa and anor. [1957] W.N.L.R.167	211-2,220
Igbodu and ors. v. Amoo [1957] W.N.L.R.22	217
Iyanda and ors. v. Ajike and ors. (1948) 19 N.L. R.11	478-9
Jacobs v. Oladunni Brothers (1935) 12 N.L.R.1	485,490,500,504
Jenmi v. Balogun and ors. (1936) 13 N.L.R.53	224,479-80,490
Jirigho v. Anamali [1958] W.N.L.R.195	89, 318
John v. John [1898] 2 Ch.593	33
Johnson, v. United Africa Company Ltd.(1936) 13 N.L.R.13	67-8
Jones, Tom, In the Estate of, Shaw and anor. v. Taylor and anor. (1918) 3 N.L.R.80	475-7
Jones v. Martins (1943) 9 W.A.C.A.100	33,190
Lawal and ors. v. Younan and ors. [1959] W.N.L.R. 155	94,212,215-8
[1961] All N.L.R.245; [1961] W.N.L.R.197	93-4, 109, 136,212, 215-7, 455
Lewis v. Bankole (1909) 1 N.L.R.82	120, 400
Lloyd v. Tench 2 Ves.Sen.212	103
Lopez and ors. v. Lopez and ors.(1924) 5 N.L.R.47	400
Loremeke v. Nekegho and anor. (1957) 3 W.A.L.R. 306	265-7,354-5
Lumpkin and anor. v. De Souza and ors. (1929) 9 N.L.R.81.....See Wright, In the Will of,	443, 455,477-8
Macaulay, In re, Adadevoh and ors. (1951) 13 W.A. C.A.304	68,85-6,95,136
Machi v. Machi [1960] L.L.R.103	44,62
Malomo and ors. v. Osho and ors. (1954) 21 N.L.R. 1	429
Martins v. Martins (1940) 15 N.L.R.126	419-20
Moons v. De Bernales (1826) 1 Russ.301	464
Nelson and anor. v. Akorofanmi [1959] L.L.R.143	444
Ntonga, In the Estate of, Unreported decision of the High Court of Zambia (Northern Rhodesia); noted in 1964 J.A.L.41	26,75-9
Nwokedi v. Nwokedi [1958] L.L.R.94	44,62

Nwugege v. Adigwe and anor. (1934) 11 N.L.R.134	239,332
Ochonma v. Ochonma Suit No. 1084/59 (unreported) Obia grade "A" customary court, Ahoada Division Port Harcourt, Eastern Region	212,214,526-7
Odunjo v. Odunjo Suit No.WD/42/62 (unreported), High Court of Lagos	44,62
Ogunmefun v. Ogunmefun and ors. (1931) 10 N. L.R.82	224
Okaludo v. Omama [1960] W.N.L.R.149	265,292
Okonkwo v. Eze [1960] N.R.N.L.R.80	44,62
Oladapo v. Akinsowon [1957] W.N.L.R.215	214-5
Oloko v. Giwa (1936) 15 N.L.R.31	401
Omoniregun v. Sadata (1888) R.C.J.15	400
Onisowo and ors. v. Fagbenro and ors. (1954) 21 N.L.R.3	190
Onwudinjoh v. Onwudinjoh (1957) II E.N.L.R.1	121-2, 445
Oyekan v. Adele [1957] 1 W.L.R.867	190
Pigg v. Clarke (1876) 3 Ch.D.672	
Pring v. Pring (1689) 2 Vern.69	143
Pryse, Re [1904] P.301	33
R. v. Eze (1950) 19 N.L.R.110	57
Rouchefoucauld v. Bowstead [1896] 1 Ch.196	143
Salami v. Salami and anor. [1957] W.N.L.R.10	167-9, 387, 400
Shaw and anor. v. Taylor and anor. (1918) 3 N.L.R.80	472
Shaw and ors. v. Kehinde and ors. (1947) 18 N.L.R.129	486,502,504
Smart v. Tranter (1890) 43 Ch.D.587	464
Smith v. Smith (1924) 5 N.L.R.102	119-20, 122, 139-41
Sogbesan and ors. V. Adebisi and ors. (1941) 16 N.L.R.26	463,481,484,487,491-3, 505-7
Sogunro Davies v. Sogunro and ors. (1929) 9 N.L.R.79	270-1
Sogunro Davies v. Sogunro Davies and ors. (1936) 13 N.L.R.15	99-100

Somefun, Re (1941) 7W.A.C.A.156	68,84-5,95,136
Suberu and ors. v. Sunmonu and ors.(1957) II F.S.C.33	190
Sule and ors. V. Ajisegiri (1937) 13 N.L.R.146	400
Taylor v. Williams and anor. (1935) 12 N.L.R.67	224,408-9,470,483
Taylor and ors. v. Taylor[1960] L.L.R.286	89,463,444
Thornton v. Curling (1824) 3 Sim.310	463
Tijani, Amodu v. Secretary, Southern Nigeria (1921) 3 N.L.R.56; [1921] 2 A.C.399	190
Twigg's Estate, Re, Twigg v. Black 1892 1 Ch.579	148
Uchendu v. Uchendu [1962] L.L.R.101	42,62
Udom v. Udom [1962] L.L.R.112	42,62
Webb v. Byng (1856) 69 E.R. 951	480
Whicker v. Hume (1858) 7 H.L.Cas.124	464
Williams, Re (Somefun) (1941) 7 W.A.C.A.156	68,85,95,136
Wright, In the Will of, Lumpkin and anor. v. De Souza and ors. (1929) 9 N.L.R.81	443,455,477-8
Young v. Young [1953] W.A.C.A. Cyclostyled Reports 19	482,486,505
Ziregbe, In the Estate of, Suit No.2/61 (un-reported) Central Urhobo grade "B" customary court, Ughelli	194-5,209-10,523-5

## PART ONE

### INTRODUCTION

#### CHAPTER ONE

### THE LEGAL SYSTEM OF THE MID-WESTERN REGION

#### Background

A full appreciation of the reasons for the type of legal system, together with the type of organisation reflected by the judicial system, now existing in the Mid-Western Region; indeed, an overall picture of the subject of this thesis can only be gained by a brief explanation, given at the outset, of certain topics forming, as it were, the background on which they are based. These background topics include: the creation of our area of special reference as one of the autonomous Regions comprising the Federation of Nigeria; the position and size of this new creation; and the peoples inhabiting the new Region, to whose law of succession special reference will be made in this thesis.

#### The creation of the Mid-Western Region

"The British created Nigeria; Nigerians created

the Mid-West"<sup>1</sup>. Up till the 8th August, 1963, the area, now known as the Mid-Western Region of Nigeria, formed an integral part of a much larger territory - the old Western Region of Nigeria. Following the due observance of the procedures laid down by the Nigerian Constitution with respect to the creation of a new Region<sup>2</sup>, including the holding of a referendum which resulted in overwhelming support for its creation<sup>3</sup>, Mid-Western Nigeria was established on the 9th August, 1963, as an autonomous Region within the Federation of Nigeria<sup>4</sup>.

Within three days of its creation, the administrative machinery of the Region was set up: an Administrator and a team of Commissioners, known collectively as the Administrative Council, were appointed to administer the Region for an interim period of six months in accordance with the provisions of a special Act of the Federal Parliament designated as the Mid-Western Region (Transitional Provisions) Act<sup>5</sup>.

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1 This was the popular cry at Warri in the Mid-Western Region as from the 14th July, 1963, after the results of the referendum held on the previous day with respect to the creation of the Region had conclusively shown that the requisite percentage of affirmative votes (at least 60% of those entitled to vote) had been secured. The writer was at Warri both during the referendum and the creation of the Region.

2 See now the Constitution of the Federal Republic of Nigeria, s.4(3).

3 89.07% of the voters voted in favour. See: Federal Government Notice No.1811 of 1963; published in the Federal Official Gazette, No.73, vol.50 of 19th September, 1963.

4 The Mid-Western Region Act, 1962 (No.6 of 1962) Appointed Day Order, 1963, L.N. 96 of 1963.

5 (1963) No. 19 of 1963.

During the life of the interim administration, steps were taken with regard to the eventual setting-up of a normal government and to the provision of a written constitution for the Region<sup>6</sup>. Arrangements were also made in connection with the establishment and composition of the Regional House of Assembly, drawing up of electoral constituencies and the holding of elections to the House of Assembly<sup>7</sup>.

Elections were held to the newly constituted Regional House of Assembly on the 3rd February, 1964<sup>8</sup>. The present government took office four days later, when the provisions of the Constitution of Mid-Western Nigeria also came into force<sup>9</sup>.

#### Position and size of the Mid-Western Region

The Mid-Western Region actually occupies the middle part of south-western Nigeria, and is situated right on the western portion of the delta formed by the country's historic and largest river, the Niger. On the north, it has administrative boundaries with both the Northern and Western Regions, taking the position from east to west. The administrative boundary with the Northern Region follows closely latitude 7° 30' N; while in the case of the Western Region, the boundary stops roughly at latitude 7° N. To the south is the Atlantic

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6 See: L.N. 9 of 1964 slightly amending W.R.L.N. 227 of 1960 (Parliamentary Electoral Regulations) for the purpose of application in the new Region; No.3 of 1964, the Constitution of Mid-Western Nigeria Act, enacted by the Federal Parliament.

7 See: L.N. 9 of 1964.

8 Federal Government Notice No.57 of 10th January, 1964.

9 M.N.N. Nos. 1-24 of 13th February, 1964; L.N.7 of 1964, the Constitution of Mid-Western Nigeria Act (Commencement) Order, 1964, s.1.



Ocean, curving into the Bight of Benin. Eastward, the lower reaches of the river Niger constitute the natural boundary between it and the Northern Region, on the one hand, and the Eastern Region on the other. The western boundary is partly an administrative one, running near longitude 5°E, which it again has with the Western Region, and partly that offered by the Atlantic Ocean or, more precisely, the Bight of Benin.

The area so defined covers some 14,923 square miles of territory<sup>10</sup>, and has a population of 2,535,839 according to the figures obtained from the last country-wide Population Census taken in November, 1963<sup>11</sup>. Barring the Federal Territory of Lagos<sup>12</sup>, our Region of special reference is easily the smallest autonomous unit, both in area and population, in the Federation of Nigeria<sup>13</sup>. It consists only of two provinces: the Benin and the Delta provinces, split up into

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10 The Nigeria handbook, 11th edn. (1936), pp. 27-8.

11 See: the Nigerian Sunday Times of 30th August, 1964. Up till the time of writing, the final figures of the last Population Census (1963) have not been published in any official gazette. This may have been due to their rejection by the Government of the Eastern Region, and the subsequent dispute which arose in connection with their acceptance by all the other Governments of the Federation. See: suits nos. 231 and 232/1964: The Attorney-General of Eastern Nigeria v. The Attorney-General of the Federation of Nigeria, (unreported) in which the Eastern Regional Government unsuccessfully challenged the validity of the census figures. The Supreme Court of Nigeria held that no legal right of the Regional Government had been infringed by the Federal Government's acceptance of the figures.

12 The area of the Federal Territory of Lagos is 27 sq. miles; the population, according to the 1963 Population Census, is 665,246. See: Burns, A.C. History of Nigeria, 6th edn. (1963), p.17; The Federation of Nigeria (1963), prepared by the Commonwealth Institute, p.19; Davies, H.O. Nigeria: the prospects for democracy (1961), p.13; The Nigerian Sunday Times of 30th August, 1964; The Nigeria Year Book (1964), p.11.

13 The total area and population of the Federation of Nigeria

ten administrative divisions<sup>14</sup>. The Regional capital is at Benin, an ancient and well-known city.

### Peoples

Inhabiting this comparatively small area of territory are what may be described as a wealth of peoples of various languages, dialects and ethnic affiliations. The geographical positions of the main ethnic groups inhabiting the Region and their dispersion into administrative divisions are as shown on the map attached to this work, and referred to as appendix I. For ease of reference, however, the ten main indigenous groups are stated here in alphabetical order as follows: the Akoko-Edo, Bini, Etsako, Ibo, Ijaw, Ishan, Isoko, Itsekiri, Ivbiosakon and the Urhobo. In the heart of the area occupied by the Ibo of the Asaba administrative division, there occur three communities of Yoruba origin<sup>15</sup>, who settled there some seven centuries ago.<sup>16</sup> They still speak a dialect

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13 ....are 356,669 sq. miles and 55,620,268 people respectively, made up as follows: Northern Region - 281,782 sq. miles, pop. 29,758,875; Western Region - 30,453 sq. miles, pop. 10,265,846; Eastern Region - 29,484 sq. miles, pop. 12,394,462; Mid-Western Region - 14,923 sq. miles, pop. 2,535,839; Federal Territory of Lagos - 27 sq. miles, pop. 665,246. See the authorities cited in footnote 12 overleaf, and the following: The Nigeria Year Book (1964), pp. 213,233 and 247; Perkins, W.A., and Stenbridge, J.H. Nigeria: a descriptive geography (1962), pp.1,83,102 and 117.

14. These are: Aboh, Afenmai, Akoko-Edo, Asaba, Benin, Ishan, Isoko, Urhobo, Warri (Itsekiri) and Western Ijaw. See: Federal Government Notice No. 156 of 23rd January, 1964; the Constitution of Mid-Western Nigeria Act, No.3 of 1964, first schedule; the Akoko-Edo Division (Establishment) Order, M.N.L.N. 70 of 16th July, 1964; Mid-Western Nigeria Notice No.338 of 12th September, 1964.

15 Thomas, N.W., Anthropological report on Ibo-speaking peoples (1914), pt.IV, p.2; Beier, H.U., "Yoruba enclave" (1958) 58 Nigeria, p.238.

16 Thomas, loc.cit.

of the Yoruba language as well as Ibo, which they use as a second language; they have adopted Ibo culture and customs in almost all other respects.<sup>17</sup> It will have been observed that the establishment of the ten administrative divisions has, to a considerable extent, followed the ethnic distribution occurring in the Region.

Too much, however, must not be made of the multiplicity of the ethnic groups inhabiting the Region. For, despite, the semblance of what may appear to the foreigner's eye as the bewildering number of ethnic variations exhibited by the peoples, one significant and, it is generally believed, uniting characteristic is shared by almost all the groups, namely their common Benin origin<sup>18</sup>. Thus, the present premier

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17 Thomas, loc.cit.; Beier, op.cit., pp.238, 247 and 251.

18 The volume of literature on this is staggering. The following may be referred to: Moloney, A., "Notes on Yoruba and the Colony and Protectorate of Lagos..." (1890) 12 Proc. of Royal Geog. Soc. (series 2), 596 at p.606; Cardi, C.N. "A short description of the natives of the Niger Coast Protectorate..." in West African Studies (1899) ed. Kingsley, M.H., pp. 449-457; Roth, H.L., Great Benin (1903), pp. 7, 99-100, and the authorities quoted therein; Thomas, op.cit., pp.2-8; Talbot, P.A., The peoples of southern Nigeria (1926), vol.1, pp.317-325, 332-4; vol.III, pp.589-592; Ward Price, H.L., Land tenure in the Yoruba Provinces (1933), para. 345; Moore, W.A., History of Itsekiri (1930), pp.25-6; Omoneukanrin, C.O., Itsekiri law and custom (1942), pp.13-18; Bowen, R.L., "The Olu of Itsekiris" (1944) 22 Nigeria, p.62, Bowen, "Obi Oputa of Aboh", ibid., p.64; Allen, H.A., "The Jekris" (1949) 20 West African Rev., p.757; Lloyd, P.C., "Tribalism in Warri" (1956) Proc. Annual Confr. W.A.I.S.E.R., March 1956, 99 at p.101; Lloyd, "The Itsekiri" in The Benin kingdom (1957), ed. Bradbury, R.E., pp.178-9; Hubbard, J.W., "The Isoko country" (1931) 77 Geog.J., 110 at 115; Welch, J.W. "An African tribe in transition" (1931) 20 Inter. Rev. of Missions, 556 at pp.557-8; Hubbard, The Sobo of the Niger Delta (1948), pp.5-6, 72-3, and chaps. 6-12; Salubi, T.E.A., "The establishment of British administration in the Urhobo country" (1958) 1 Journal of the

of the Region, Chief Osadebay, has justified the choice of Benin as the regional capital on the grounds that this city is "the ancestral and cultural home of almost all of us in the Mid-West"<sup>19</sup>. In addition and, no doubt, because of this common Benin (Edo) origin, seven of the ten major ethnic groups (Akoko-Edo, Bini, Etsako, Ishan, Isoko, Ivbiosakon and Urhobo) have linguistic affinities and other common cultural features; they are collectively known as the Edo-speaking peoples<sup>20</sup>.

### THE LEGAL SYSTEM

The legal system of the Mid-Western Region, including the judicial system and the types of law administered by the Regional courts, offers no material difference from the systems in other jurisdictions within the Federation of Nigeria; the Federal Territory of Lagos, having no customary or native courts, being excepted with respect to the judicial

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18....Hist. Soc. of Nigeria, 184 at pp. 197-8; Butcher, H.L.M.

"Some aspects of the otu system of the Isa sub-tribes of the Edo people" (1935) 8 Afr. p.149; Bradbury, The Benin kingdom, pp. 13,19,22,63,85,101,112 and 130-1; Egharevba, J.U., A short history of Benin, 3rd edn.(1960), pp.5,22-3, 27,30,35,42-3,85-8; Okojie, C.G., Ishan native laws and customs (1960), pp. 23,30,66 and 246; Dike, K.O., Trade and politics in the Niger Delta (1956), pp.21-26; Beier, H.U., "The dancers of Agbor" (1959) 7 Odu, p.41; Crowder, M., The story of Nigeria (1962), pp.55,68 and 74.

19 See the Nigerian Sunday Times of 8th August, 1963.

20 See: Thomas, Anthropological report on the Edo-speaking peoples (1910), pt 1, pp.5 and 64 ff.; Thomas, "Marriage and legal customs of the Edo-speaking peoples" (1910), 11 J. Comp. Leg. (.N.S.), 94 at 94-5; Thomas, "The Edo-speaking peoples" (1910) 10 J.A.S. p.1; Bradbury, The Benin kingdom, pp. 13-17,61,81,84,100,110,123 and 127. The term Edo people, however, refers exclusively to the Bini, who call themselves and their city (Benin) Edo.

system<sup>21</sup>. The common patterns of these Nigerian systems - duality of courts (English and customary or native courts, except in the case of Lagos) and of law (English or general law and customary law or native law and custom) - as well as other aspects of the systems have been fully covered by the standard works now available<sup>22</sup>.

In one respect, however, the legal system of the Mid-Western Region, with regard to the general law now in force therein, is in marked contrast with the position obtaining in any of the other jurisdictions in the country. This is because, as will appear shortly, Mid-Western Nigeria is at present the lone jurisdiction applying practically the whole body of the general law of another Region. It is this rather interesting aspect of the legal system of the new Region, together with one or two related topics, that will occupy our attention in the remaining part of this chapter. The related topics are: a brief indication of the two types of law governing succession in the Region; and mention of the appropriate courts in which disputes and claims, arising out of succession, are determined.

#### The general law in force in the Region

The bulk of the general law at present in force in the Mid-Western Region is the corpus of the Laws of the

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21 Allott, A.N., Judicial and legal systems in Africa (1962), p.47; Nwabueze, B.O., The machinery of justice in Nigeria (1963), p.32; Park, A.E.W., The sources of Nigerian Law (1963), pp.68 and 118.

22 See: Allott, op.cit., pp. 44-75; Nwabueze, op.cit.; chaps. 1-12; Park, op.cit., Chap. 1; Elias, T.O., Groundwork of Nigerian law (1953), chaps. 1-11; Elias, The Nigerian legal system (1962), chaps.1-11.

Western Region of Nigeria<sup>23</sup> as it stood on the 9th August, 1963, when the new Region was established.

The provisions, by virtue of which this general law continues to be in force in the Mid-Western Region, are now contained in paragraph 6 of the second schedule to the Constitution of the new Region<sup>24</sup>. This paragraph substantially embodies the earlier relevant provisions of sections 2, 3, and 4 of the Mid-Western (Transitional Provisions) Act<sup>25</sup>, which regulated the position during the period of the interim administration of the Region.

The paragraph provides:-

- (1) Any law, which, immediately before the appointed day [i.e. the 9th August 1963, when the Mid-Western Region was created], is in force in any part of the Region by virtue of section two, three or four of the Transitional Provisions Act, shall until it is changed by an authority having power to do so and subject to paragraph 5 of this Schedule (i.e. the paragraph dealing with the assets, liabilities and the Consolidated Revenue Fund of the Region), continue in force in the Region or part with such modifications (whether by way of addition, alteration or omission) as may be necessary to bring it into conformity with this Constitution.
- (2) Without prejudice to the provisions of the foregoing sub-paragraph, where any matter:-
  - (a) fails to be prescribed under this Constitution by the Legislature of the Region or any other authority; and
  - (b) is prescribed by any law having effect by virtue of that sub-paragraph or paragraph 5 of this Schedule,
 that law shall, as respects that matter, be deemed to have been made by the Legislature or other authority

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23 Published in 1959, these Laws run into seven volumes.

24 The Constitution of Mid-Western Nigeria Act, No.3 of 1964.

25 (1963), No. 19 of 1963.

in question.

- (3) For the avoidance of doubt, it is hereby declared that the provisions repealed by section 154 of the Constitution of the Federation [i.e. the Act of the British Parliament entitled the Nigeria Independence Act<sup>26</sup> and the Nigeria (Constitution) Order in Council<sup>27</sup> (other than the third, fourth and fifth schedules<sup>28</sup> to that Order)] ceased to have effect as respects the Region on the coming into force of this Constitution, and accordingly nothing in sub-paragraph (1) of this paragraph shall be construed as continuing those provisions in force as respects the Region.
- (4) For purposes of subsection (1) of section three of the Constitution of Mid-Western Nigeria Act, 1964 [i.e. as regards the provisions relating to the establishment and composition of the Mid-Western House of Assembly, electoral constituencies, etc., which were deemed to have come into force on the 1st November, 1963], but not for any other purposes, the reference in this paragraph to the appointed day shall be construed as a reference to the relevant date mentioned in that subsection [i.e. 9th August, 1963].

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26 (1960) 8 and 9 Eliz. 2, c.55.

27 (1960), S.I., No.1652.

28 These schedules contain the Constitutions of the Northern, Western and Eastern Regions respectively.

Jurisdiction of the High Court of the Mid-Western Region -  
up till the 11th February, 1964

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Another interesting aspect of the judicial system of the Mid-Western Region was that the jurisdiction of its High Court was different from that of the High Court of the Western Region, whose general law (as it stood on the 9th August 1963) is in force in the new Region; and was that of the High Court of Lagos.

The jurisdiction of the High Court of Lagos was extended to the Mid-Western Region by section 6 of the Mid-Western Region (Transitional Provisions) Act<sup>1</sup>; and was continued by paragraph 3 of the second schedule to the Constitution of Mid-Western Nigeria Act<sup>2</sup>, when the former Act was repealed.

Paragraph 3 of the schedule provided that:

- (1) The High Court of Lagos shall, to the exclusion of the High Court of the Region, exercise the jurisdiction conferred by this Constitution on the last-mentioned court -
  - (a) subject to the following provisions of this subparagraph, until such day as the Governor may by order appoint or the expiration of the year nineteen hundred and sixty-four, whichever first occurs; and
  - (b) as respects any proceedings which, by virtue of the foregoing provisions of this subparagraph, are pending in the High Court of Lagos immediately before the day or the expiration of the period aforesaid, and references in this Constitution to the High Court of the Region shall be construed accordingly.

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1 (1963), No.19 of 1963.

2 (1964), No.3 of 1964.



- (2) The High Court of Lagos shall, as respects proceedings pending in that court immediately before the appointed day, continue to exercise to the exclusion of any other court the jurisdiction conferred on it by section 6 of the Transitional Provisions Act<sup>1</sup>.

Some Comments on the special provisions applying the general law of the old Western Region to the Mid-Western Region

The position under which the general law of the old Western Region was specifically made to be applicable in the Mid-Western Region may be interesting, but by no means startling. Firstly, it may be recalled that the Region was part and parcel of the old Western Region; and as such has a legitimate claim to the general law of the old Region, now split into two. Before the split the whole area enjoyed the same legal and judicial systems. Secondly, the special provisions applying this general law to the new Region contain adequate safeguards in respect of the Region's application of such general law. The general law is that as it stood on the 9th August, 1963; so that any subsequent alteration by the competent authority of the present Western Region does not affect the position in the Mid-Western Region. The more important safeguard, however, is the power given to the Mid-Western Regional competent authority to alter or repeal the general law specially made applicable in the Region, as may be necessary to bring it into conformity with the Constitution of the Region. Let us examine the

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1 (1963), No.19 of 1963.

instances, both during the period of interim administration and since the formation of a normal government, where such alteration or repeal of the general law applicable in the Region has been effected by the Regional competent authority.

Alteration of the applicable general law during period of interim administration

During this period the competent authority having power to effect alteration or repeal of the applicable general law was the Administrative Council (the Administrator and his Commissioners), together with the Prime Minister of the Federation, whose approval was required before any alteration or repeal came into force<sup>1</sup>.

The competent Regional authority did not exercise its powers in this regard to any appreciable extent during the period of the interim administration. This period was one, during which that authority concerned itself almost exclusively with the maintenance of law, order and good government in the Region; and with arrangements relating to the establishment and composition of the Regional House of Assembly, the fixing of parliamentary constituencies and the holding of elections to the Regional House of Assembly. Accordingly, the only slight alteration made in respect of

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<sup>1</sup> The Mid-Western Region(Transitional Provisions) Act, 1963 (No.19 of 1963), s.3.

the applicable general law was the amendment of the Electoral Regulations of the old Western Region<sup>2</sup>, so as to re-organise the parliamentary constituencies in the new Region<sup>3</sup>.

Modifications of the applicable general law since the formation of a normal government

Establishment of a Regional High Court

The High Court of the Mid-Western Region was established under section 48 of the Constitution of Mid-Western Nigeria Act, with effect from the 7th February 1964, when the Regional Constitution came into force<sup>4</sup>, and when the present government also took office<sup>5</sup>.

Five days later, the Governor of the Region made an order abolishing the jurisdiction of the High Court of Lagos over the Mid-Western Region<sup>6</sup>, by virtue of the powers conferred on him by paragraph 3 of the second schedule to the Regional Constitution.

Creation of new Judicial Divisions and magisterial districts

The former two Judicial Divisions comprised in the area, now known as the Mid-Western Region<sup>7</sup>, were re-organised into six Judicial Divisions<sup>8</sup>. Similarly, the former three<sup>9</sup>

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2. W.R.L.N. 227 of 1960.

3 See: L.N.9 of 1964.

4 L.N.7 of 1964; the Constitution of Mid-Western Nigeria (Commencement) Order, s.1.

5 M.N.N. Nos. 1-24 of 13th February, 1964.

6 M.N.L.N. 1 of 1964; High Court of Mid-Western Nigeria (Appointed Day) Order.

7 W.R.L.N. 2 of 1959; and W.N.L.N.1 of 1962.

8 M.N.L.N. 88 of 1964; dated 18th September, 1964, but with retrospective effect from 12th February, 1964. Three earlier legal notices (M.N.L.N.24 of 1964, M.N.L.N.48 of 1964 and M.N.L.N.66 of 1964) contained only five Judicial Divisions.

9 W.R.L.N.139 of 1959.

magisterial districts were split into twelve separate magisterial districts<sup>10</sup>.

### Amendment of the Customary Courts Rules

The rules regulating the practice and procedure of the customary courts with respect to the granting of bail for accused persons have been amended and slightly relaxed. In particular, a customary court of appeal is now empowered to admit an accused person to bail, notwithstanding that the court below has refused to grant him bail.<sup>1</sup> Under the old rules, the power to grant bail in such circumstances was restricted to the High Court or the magistrate's court<sup>2</sup>.

A new provision has been added to the rules of the customary courts which now requires a court, in which a person has been convicted, to inform him of his right of appeal from such conviction<sup>3</sup>.

Also amended are the provisions of the Customary Court Members (Conditions of Service) Regulations<sup>4</sup> relating to the appointment and remuneration of legally qualified sole presidents of grade A customary courts employed on part-time basis. Hitherto, such persons earned a salary of £1,380 per annum, if they had been legally qualified for more than ten years prior to the date of appointment<sup>5</sup>. Under

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10 M.N.L.N. 23 of 1964.

1 M.N.L.N. 89 of 1964, the Customary Courts (Amendment) Rules, 1964; Order VI, Rule 1(3).

2 W.R.L.N. 260 of 1959, incorrectly referred to in M.N.L.N. 89 of 1964, op.cit., as W.R.L.N. 258 of 1958, which had been superseded by W.R.L.N. 260 of 1959, with effect from 1st August, 1959.

3 M.N.L.N. 89 of 1964, ibid, Order XVIII, Rule 1(3).

4 W.R.L.N. 239 of 1960.

5 Ibid, first schedule.

the new dispensation, however, they get up to £1,422 per annum if they have just more than six years' experience after having been called to the Bar<sup>1</sup>.

Finally, the Customary Courts (Amendment) Rules, made in 1962 during the period of emergency that occurred in the old Western Region, have now been revoked<sup>2</sup>.

#### Proposed changes in the existing general law

It is proposed to make amendments, alterations and changes in respect of the following:-

- (a) the Communal Land Rights (Vesting in Trustees) Law;<sup>3</sup>
- (b) the Sheriffs and Civil Process Ordinance;<sup>4</sup>
- (c) the High Court Law;<sup>5</sup>
- (d) the Road Traffic Law;<sup>6</sup> and
- (e) the Local Government Law.<sup>7</sup>

- (a) The Communal Land Rights (Vesting in Trustees) (Amendment) Bill<sup>8</sup>

Under the provisions of this Bill, it is proposed to amend the definition of "traditional authority" in whom the communal rights may be vested as trustees for the com-

1 M.N.L.N. 92 of 1964, the Customary Court Members (Conditions of Service)(Amendment) Regulations, 1964.

2 These rules were contained in W.N.L.N. 317 of 1962; see M.N.L.N. 89 of 1964, op.cit., which revoked them.

3 Laws of the Western Region of Nigeria, 1959, cap. 24.

4 It is not at all clear what piece of legislation the amending authority has in mind, since there were no Ordinances in force in Western Nigeria when the Mid-Western Region was established. Besides, the Designation of Ordinances Act, No.57 of 1961, makes it clear that all Federal statutes, formerly designated as Ordinances, etc., are now to be called Acts.

5 Laws of the Western Region of Nigeria, 1959, cap.44.

6 Ibid, cap.113.

7 Ibid, cap.68.

8 (1964), published in the Supplement to the Mid-Western Nigerian Gazette, No.22, vol.1 of 21st May, 1964.

munity. Section 2 of the Communal Land Rights (Vesting in Trustees) Law<sup>1</sup> limits the definition of "the traditional authority" to chiefs so declared by the Governor in Council. The proposed amendment seeks to broaden the definition to include a local government council or any person or body of persons having the experience of, or having shown capacity in, matters relating to communal rights.\*\*

(b) The Sheriffs and Civil Process Bill<sup>2</sup>

It is difficult to ascertain the piece of legislation which this Bill seeks to amend. Section 4 of the Bill speaks of a proposed amendment of section 12 of the Sheriffs and Civil Process Ordinance. Now, Federal laws have, since 1st October 1960, ceased to be known as Ordinances by virtue of the Designation of Ordinances Act<sup>3</sup>, which has designated them as Acts. Nor was there any Federal law relating to civil process in force in the Mid-Western Region at the date of its creation. It is submitted, with respect, that what the Bill could properly seek to amend are the provisions of the Sheriffs and Civil Process Law which continue to be in force in the Mid-Western Region by virtue, first, of the Mid-Western Region (Transitional Provisions) Act; and, now, by paragraph 6 of the second schedule to the Constitution of Mid-Western Nigeria.

In addition, the Bill, with respect, quite inelegantly proposes to provide for the criminal execution of the sentence of capital murder. Section 4 of the Bill which contains

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1 Laws of the Western Region of Nigeria, 1959, cap.24.

2 (1964) published in the Supplement to the Mid-Western Nigeria Gazette, No.30, vol. 1, of 18th June, 1964.

3 No.57 of 1961.

\*\* The Bill became law late last year. See: The Communal Land Rights (Vesting in Trustees)(Amendment) Law, M.N.L.N. 5 of 1964.

the provisions reads:-

"Where sentence of death has been pronounced upon a person, the Sheriff shall as ordered, and unless the sentence is commuted or a respite is granted, cause the sentence to be carried into execution by some person appointed in writing by the Sheriff<sup>1</sup>".

(c) The High Court Law<sup>2</sup>

The provisions of this Bill are based substantially on those of the High Court Law of the Western Region, which are at present in force in the Mid-Western Region<sup>3</sup>. There are also three provisions governing the right of appeal to the Supreme Court of Nigeria, which are a reproduction of the Rules of this Superior Court, with respect to appeals going to it from the High Courts of the various jurisdictions in the country.

There is, however, one original provision in the Bill, This deals with the retiring age of the Judges of the High Court, which has been fixed at sixty-two years<sup>4</sup>.

(d) The Road Traffic(Amendment) Bill<sup>5</sup>

Under this Bill, it is proposed to amend section 25 of the Road Traffic Law<sup>6</sup> by inserting a new section immediately after the existing section, to be referred to as section 25A.

The object of the proposed amendment is to give powers to police officers to enable them to retain the driving licences of traffic offenders pending the serving of summonses on such offenders. The framers of the Bill have in mind

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<sup>1</sup> S.4 of the Sheriffs and Civil Process Bill, *ibid.*

<sup>2</sup> (1964), published in the Supplement to the Mid-Western Nigeria Gazette, No.42, vol.1, of 7th August 1964; as Mid-Western Nigeria Notice No.275.

<sup>3</sup> Laws of the Western Region of Nigeria, 1959, cap.44.

<sup>4</sup> The High Court Bill, *op.cit.*, s.7.

<sup>5</sup> Mid-Western Nigeria Notice, No.275, *op.cit.*

<sup>6</sup> Laws of the Western Region of Nigeria (1959), cap.113.

the practice of some traffic offenders who give false or misleading addresses to the police.<sup>1</sup>

(e) The Local Government (Amendment) Bill<sup>2</sup>

This Bill seeks to add the words "or fails" to the word "refuses" occurring in the second line of the provisions of section 255 of the Local Government Law; thereby creating a new penalty for failure to pay rates. The purpose of the proposed amendment is stated in the Bill as follows: "As the Law stands now, 'refusal' to pay rates must be proved to constitute an offence. Experience has shown that it is not always easy to prove the fact of refusal, and the task of enforcing payment of rates is for that reason made very difficult". (3)

BRIEF INDICATION OF THE TWO TYPES OF LAW GOVERNING SUCCESSION  
IN THE MID-WESTERN REGION

The two types of law governing succession in the Region are the general or English law, and the customary law. Both types of law will be fully dealt with in the subsequent chapters. For the present, it is not intended to do more than indicate the various statutes embodying the general law as well as the indigenous bodies of law (customary law) of the various ethnic groups inhabiting the Region.

The general law

The general law of succession (including the administration of estates) in the Region is contained in local

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- 1 The Bill is now law. See: The Road Traffic (Amendment) Law, M.N.L.N.8 of 1964.
  - 2 Mid-Western Nigeria Notice, No.275, op.cit.
  - 3 The Bill became law late last year. See: The Local Government (Amendment) Law, M.N.L.N.6 of 1964.



statutes which include:

- (i) the Administration of Estates Law;<sup>1</sup>
- (ii) the Administrator-General's Law;<sup>2</sup>
- (iii) the Legitimacy Law;<sup>3</sup> and
- (iv) the Wills Law<sup>4</sup>.

#### When the general law of succession applies

As will be fully shown in later chapters, the general law relating to intestate succession applies where a person, married under a monogamous or Christian system of marriage, dies intestate while domiciled in the Region; or where such a person (whether or not he was also domiciled in the Region) dies intestate, leaving real property situated in the Region.

As regards testate succession, the general law governs the position where a testator makes a will in English or the general law form, irrespective of the system under which a marriage is contracted. The law of wills is treated fully in later chapters.

#### Customary law

In respect of the Western Region, it is possible to speak of a broad uniform system of customary law of succession - Yoruba customary law. As regards the Mid-Western Region, however, this is dangerous; and one must refer specifically to the society one has in mind, since the various ethnic groups already enumerated have their own systems, with local variations sometimes occurring within one and the same system. We are, therefore, concerned with at least ten

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1 Laws of the Western Region of Nigeria, 1959, cap.1.

2 Ibid, cap.2.

3 Laws of the Western Region of Nigeria, 1959, cap.62.

4 Ibid, cap.133.

main systems (corresponding with the number of the main ethnic groups), together with any local variations which may exist under one or more of the ten main systems of the customary law.

Despite this multiplicity of systems, however, it is possible, as will be shown later, to classify the various bodies of indigenous law governing succession into three main patterns in the essentially patrilineal societies; with a fourth pattern for the groups in which both the patrilineal and matrilineal principles exist side by side. The basis of this classification, which will be discussed later, is whether only eldest sons, or all sons, or all children are entitled to inherit from one or both of their parents.

The forum or the appropriate court in which proceedings relating to succession are brought

Where succession is governed by the general law

Where the succession is governed by the general law, the appropriate court in which proceedings may be instituted is the High Court of Justice<sup>1</sup>. Neither the magistrates' courts<sup>2</sup> nor the customary courts<sup>3</sup> have jurisdiction in causes and matters relating to succession governed by the general law.

Where succession is governed by customary law

Where customary law applies to the succession,

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- 1 The High Court Law (Western Region), *ibid.*, cap.44, s.9; the Administration of Estates Law (Western Region), *ibid.*, cap.1, s.2 (1); the Administrator-General's Law (Western Region), *ibid.*, cap.2, s.2.
  - 2 See the authorities cited in footnote 3 (p.20); also the Magistrates' Courts Law (Western Region), *ibid.*, cap.74, s.20(b).
  - 3 W.R. No. 34 of 1959, the Customary Courts (Amendment) Law 1959, second schedule; amending the second schedule to the Customary Courts Law, 1957, cap.31, *op.cit.*

customary courts have exclusive original jurisdiction<sup>1</sup>. Appeals from these courts go to the magistrates' courts<sup>2</sup> and the High Court<sup>3</sup>; the last court also exercising appellate jurisdiction over magistrates' courts<sup>3</sup>. In appropriate cases, an appeal lies from the High Court to the Supreme Court of Nigeria<sup>4</sup>.

In addition to the channels of appeal from the customary courts to the non-customary, or English courts, there is the avenue of review by means of which chief magistrates, acting as supervising authorities, exercise powers of review in respect of all cases tried by the customary courts<sup>5</sup>.

Original jurisdiction of the High Court and of the magistrates' courts where succession is governed by customary law

The High Court

It has always been assumed that the High Court is precluded from exercising original jurisdiction where the cause or matter is governed by customary law. This seems to be the interpretation put on the provisions of the High Court Law, which exclude the original jurisdiction of that Court in any matter "which is subject to the jurisdiction of a customary court relating to .... inheritance or disposition of property on death"<sup>6</sup>.

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<sup>1</sup> W.R. No.34 of 1959, the Customary Courts (Amendment) Law, 1959, second schedule; amending the second schedule to the Customary Courts Law, 1957, cap. 31, op.cit.

<sup>2</sup> Cap.31, s.47.

<sup>3</sup> Ibid., s.48.

<sup>4</sup> That is, where the amount in dispute is £50 or more, cap.31,

<sup>5</sup> Cap.31, ss. 44A-44E.

(s.49.

<sup>6</sup> Cap.44, op.cit., s.9.

It has, however, never been argued that where such a cause or matter involves an amount in excess of the jurisdiction of the appropriate customary court or courts, or where, in fact, no customary court exists in the area concerned (for example, where the establishing warrant is temporarily withdrawn as happened to the majority of courts in the Delta Province in 1963), it would amount to misuse of language to insist that such a cause or matter is "subject to the jurisdiction of a customary court". This is because in one case, the customary court would be incompetent to exercise jurisdiction; in the other, there simply would be no such court to whose jurisdiction the cause or matter would be subject. It is submitted that in the cases instanced, it would be open to the High Court to assume original jurisdiction.

It is a matter for regret that no thought has been given to a clearer wording of the excluding provisions contained in the proposed High Court Bill<sup>1</sup>, which has instead copied the relevant provisions of the existing High Court Law. Had some consideration been given to the matter, model provisions would have been found in the Magistrates' Courts Law<sup>2</sup>, which will be discussed in the next paragraph.

#### Magistrates' courts

In contrast to those contained in the High Court

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1 Op.cit., s.10.

2 Cap.74, Laws of the Western Region of Nigeria, 1959.

Law, just discussed, the relevant provisions of the Magistrates' Courts Law<sup>2</sup> are distinguished by their clarity. These latter provisions exclude the original jurisdiction of magistrates' courts in causes or matters "relating to inheritance upon intestacy under customary law and the administration of intestate estates under customary law<sup>3</sup>".

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2 Cap. 74, Laws of the Western Region of Nigeria, 1959.

3 Ibid, s.20 (d).

PART TWOTHE GENERAL LAW RELATING TO ADMINISTRATION OF ESTATES AND  
AND INTESTATE SUCCESSIONCHAPTER TWOADMINISTRATION OF ESTATES1. Courts exercising jurisdiction in administration suits

We have already seen that jurisdiction in causes and matters pertaining to the administration of estates under the general law in force in the Western and the Mid-Western Regions is vested in the High Courts, with the Supreme Court of Nigeria acting as the Court of Appeal; and that the magistrates' courts exercise no jurisdiction whatsoever in these causes and matters. This is also the position in the Federal Territory of Lagos<sup>1</sup> and the Eastern Region<sup>2</sup>.

2. Law relating to administration

The general law at present in force in southern

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- 1 The High Court of Lagos Act, cap.80, s.11. Laws of the Federation of Nigeria and Lagos, 1958; the Magistrates' Court (Lagos) Act, cap.113, s.14, ibid. On right of appeal to the Supreme Court, see: cap.80, s.50, ibid; the Constitution of the Federal Republic of Nigeria, 1963, s.117.
  - 2 The High Court Law, Eastern Region, No.27 of 1955, s.10; the Magistrates' Courts Law, Eastern Region, No.10 of 1955, s.17. On right of appeal to the Supreme Court, see: The High Court Law, ibid, s.37; the Constitution of the Federal Republic of Nigeria, loc.cit.

Nigeria with respect to the administration of estates is, subject to the provisions of any locally enacted statutes to the contrary, partly the current English law on the subject; and partly local enactments based substantially on English law.

(a) Lagos and the Eastern Region - Current English law

In both the Federal Territory of Lagos and the Eastern Region, the current English law is made applicable by virtue of special provisions contained in the High Court Act<sup>1</sup> and the High Court Law<sup>2</sup>, respectively, which incorporate that law (current English law) by reference. Thus, section 16 of the High Court of Lagos Act provides:-

"The jurisdiction of the High Court in probate<sup>3</sup>, divorce and matrimonial causes and proceedings may..... be exercised by the court in conformity with the law and practice for the time being in force in England<sup>4</sup>".

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1 Cap.80, ibid.

2 No.27 of 1955, s.16.

3 Underlined for emphasis. Does probate include the grant of Administration? The answer, obviously, is "yes". See, for instance, section 20 of the Supreme Court of Judicature (Consolidation) Act (1925) (15 & 16 Geo.5, c.49) which has defined the probate jurisdiction of the English High Court to include the granting or revoking of administration. See also the Zambian (Northern Rhodesian) case of In the matter of the Estate of Ntonga, decided by the High Court of Zambia, where Conroy, C.J. followed the English statutory definition; and held that the probate jurisdiction of the High Court of Zambia includes the authority to grant letters of administration. For a note on this case, see [1964] J.A.L.41.

4 The High Court Law, Western Region, limits this to matters of procedure and practice only: cap.44, ss.9 and 11, Laws of the Western Region, 1959.

This means, of course, that the relevant provisions of the English Administration of Estates Act<sup>1</sup> and the principles laid down in the English decisions bearing on the matter apply to Lagos and the Eastern Region.

(b) Western and Mid-Western Regions - Local statute based on English law

The applicable law governing the administration of estates under the general law in force in both Regions is the Administration of Estates Law<sup>2</sup>. But, as has been stated, this Law is substantially as much English as the Administration of Estates Act<sup>1</sup> itself. It (the Law) contains copious marginal notes indicating its source, and, therefore, leaves no room for doubt as to which of both statutes is based on the provisions of the other.

(c) Other local statutes

There are also a number of other Acts and Laws dealing with the subject of the administration of estates under the general law. They include:

- (i) the Administration (Foreign Employment) Act<sup>3</sup>;
- (ii) the Administration (Real Estate) Act<sup>4</sup>;
- (iii) the Administration of Estates by Consular Officers Act<sup>5</sup>;
- (iv) the Administrator-General's Act<sup>6</sup>;

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1 (1925) 15 Geo. 5, c.23.

2. Op.cit. Its provisions came into force on 23rd April, 1959.

3 Cap.1, Laws of the Federation of Nigeria and Lagos, 1958.

4 Cap. 2, ibid.

5 Cap.3, ibid.

6 Cap.4, ibid.



- (v) the Administrator-General's Law<sup>1</sup>; and
- (vi) the Administrator-General Law<sup>2</sup>.

### TREATMENT OF THE SUBJECT

It is not intended in this chapter or, indeed, in this thesis to deal at any length with the "received" or "copied" English law relating to the administration of estates. This means that, except for the purposes of comparison or amplification, the Administration of Estates Act, the English decisions on the matter and the Administration of Estates Law of the Western Region will not be accorded any detailed treatment. The reader is referred to the standard works on the subject<sup>3</sup>.

This method of treatment leaves us with only the discussion of the local Acts and Laws governing the administration of estates under the general law.

### 3. Areas where the local Acts and Laws apply

From the point of view of the area of application, the local Acts and Laws dealing with the topic of administration governed by the general law may be grouped into three headings as those applying:-

- (a) throughout southern Nigeria;
- (b) only in the Federal Territory of Lagos; and
- (c) only in the Western, the Mid-Western and the Eastern Regions.

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1 Cap.2, Laws of the Western Region, 1959.

2. No.17 of 1961, Eastern Region. Its provisions came into force on 1st August 1962: see E.N.L.N. No.60. of 1962.

3 See: Parry, The law of succession, 4th edn. 1961, chaps. 10-15; generally, Williams, Executors and administrators, 14th edn. 1960, vol.1.

(a) Acts applying throughout southern Nigeria

Both the Administration (Foreign Employment) Act<sup>1</sup> and the Administration of Estates by Consular Officers Act<sup>2</sup> apply throughout southern Nigeria and, indeed, throughout the Federation of Nigeria. The provisions of both Acts are designed to deal with the administration of estates in which a foreign element is involved or is likely to be involved. We shall consider these Acts separately.

The Administration (Foreign Employment) Act<sup>1</sup>

This Act, as its title implies, provides for the administration of the estate of a native<sup>3</sup> employed under a

1 Cap. 1, Laws of the Federation of Nigeria and Lagos, 1958.

2. Cap. 3, Ibid.

3 "Native" is defined in the repealed section of the Interpretation Act. "It includes a native of Nigeria and a native foreigner". "Native of Nigeria" means any person, whose parents were members of a tribe or tribes indigenous to Nigeria and the descendants of such persons; and includes any person one of whose parents was a member of such a tribe. "Native foreigner" means any person (not being a native of Nigeria) whose parents were members of a tribe or tribes indigenous to some part of Africa and the descendants of such persons, and shall include any person one of whose parents was a member of such tribe. See Section 3 of the Interpretation Act, cap. 89, ibid. See also an identical provision contained in the Interpretation Law, Western Region, cap. 51, s. 3: Laws of the Western Region, 1959. The Interpretation Act seems to apply to the Eastern Region: see the Interpretation Act (Amendment) Law, Eastern Region, No. 11 of 1960, which by amending the Interpretation Act implied that the Act was in force in that Region. This definition of "native" is broad enough to cover American negroes and West Indians of negro stock, but not Europeans or Asians. Note, however, that this section of the Interpretation Act has been repealed by the new Interpretation Act, No. 1 of 1964, designating the unrepealed part of the old Interpretation Act as the Law (Miscellaneous Provisions) Act.

foreign contract of service, who dies intestate<sup>1</sup>, leaving unpaid wages and emoluments, which have been defined as "estate" in section 2 of the Act<sup>2</sup>.

On the death intestate of such a native<sup>3</sup>, his estate vests automatically in the Official Administrator<sup>4</sup>, the Government official charged with the duties of administration under the provisions of the Act<sup>5</sup>. Where the estate is situated outside Nigeria, the Official Administrator is under a duty to cause it to be brought into the country.<sup>6</sup> All assets are paid into the Treasury<sup>7</sup>.

It is also part of his duties to publish in the Official Gazette, to be posted in some public place at the deceased's native town or village or last known place of the deceased's abode; stating the fact of the death, the particulars of the estate and inviting claimants to the estate to submit their applications within a specified time<sup>8</sup>.

Any claims put forward are examined and adjudicated upon by the Official Administrator, who may direct his Deputy to take evidence in respect of any claim<sup>9</sup>. The Official Administrator certifies his decision, which he forwards to the Accountant-General, directing the latter

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1 Cap. 1, s.3, ibid.

2 Cap.1, Laws of the Federation of Nigeria and Lagos, 1958.

3 See: footnote No.3 on page 29.

4 Ibid, s.6.

5 Ibid, s.4.

6 Ibid, s.7.

7 Ibid, s.8.

8 Loc.cit.

9 Ibid, s.9.

to satisfy the successful claim<sup>1</sup>. Any claimant aggrieved by the decision of the Official Administrator may, within one month of the decision, appeal to the appropriate High Court<sup>2</sup>.

A successful claimant is, however, responsible for the payment of the debts due from the deceased<sup>3</sup> and any expenses incurred by the Official Administrator in realising the estate<sup>3A</sup>. In addition, a sum of five pounds per cent is deducted by the Accountant-General to defray the costs of administration<sup>4</sup>.

The Official Administrator incurs no liability in respect of any decision or adjudication given or made by him in good faith; nor in respect of anything done or omitted to be done by him in good faith, in the execution or supposed execution of his powers under the Act<sup>5</sup>.

#### The Administration of Estates by Consular Officers Act<sup>6</sup>

The Administration of Estates by Consular Officers Act governs the administration of the estates of nationals of foreign States<sup>7</sup> with which the Federation of Nigeria has treaty obligations. It applies where such foreign nationals die intestate, leaving property in Nigeria; and there are no persons present in Nigeria, at the time of death, who are entitled to administer such foreign nationals' estates<sup>8</sup>. The provisions of the Act enable

1 Ibid., s.11.

2 Ibid., s.10.

3 Ibid., s.13.

3A Ibid., s.15.

4 Ibid., s.16.

5 Ibid., s.14.

6 Cap.3, Laws of the Federation of Nigeria and Lagos, 1958.

7 For a list of the treaties (of commerce and navigation), see the schedule to the Act.

8 Ibid., s.2.

the consular officers of such foreign States to take possession and have custody of the property of such deceased persons<sup>1</sup>. The consular officers may apply the property in payment of the debts due from such deceased persons and in defraying the funeral expenses; retaining any balance for the benefit of those entitled<sup>1</sup>. They must, however, immediately apply to the appropriate High Court for the granting of the letters of administration<sup>1</sup>.

(b) Acts applying only to the Federal Territory of Lagos

(i) The Administration (Real Estate) Act<sup>2</sup>

Under the Administration (Real Estate) Act<sup>2</sup>, the real property of an intestate is treated as personal property for the purposes of administration<sup>3</sup>. But the real property, in respect of which the intestate has no powers of testamentary disposition under customary law, is expressly excluded from the provisions of the Act<sup>4</sup>. Thus, section 2 of the Act<sup>4</sup> provides:-

"When any person shall die intestate....leaving real property of whatsoever nature of which the intestate might have disposed by will, such real property shall for the purposes of administration be deemed to be part of the personal estate of the said intestate and shall be administered accordingly: provided always that the real property, the succession to which cannot by native law and custom be affected by testamentary disposition, shall descend in accordance

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1 Ibid, s.2 (b).

2 Cap. 2, Laws of the Federation of Nigeria and Lagos, 1958.

3 Ibid, s.2.

4 Cap.2, ibid.

with the provisions of such native law or custom anything herein contained to the contrary notwithstanding..."

One result of placing the intestate's real estate in the same position as his personal estate for the purposes of administration is that anyone intermeddling with the estate, whether real or personal, without having obtained the grant of administration thereby constitutes himself an executor de son tort. Thus, in Jones v Martins<sup>1</sup>, the defendant, the sister of the intestate, had collected rents on the house left by her deceased brother. The plaintiff, a medical practitioner, sued her as an executor de son tort in respect of professional services rendered to the deceased during his lifetime. The West African Court of Appeal held that the effect of section 2 of the Administration (Real Estate) Act was to put the intestate's real and personal estate on an equal footing, for the purposes of administration, and that the intermeddling by the defendant in the real estate constituted her an executor de son tort, and made her liable to the plaintiff<sup>2</sup>.

The real estate of the intestate shall not, however,

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1 (1943) 9 W.A.C.A.100.

2 At pp.101 and 103. But for the provisions of the Act, the defendant would not have been liable as executor de son tort because the real estate of the deceased intestate would have passed direct to his heir-at-law. There would then have been no administrator whose functions the defendant had usurped. See: Jones v Martins, op.cit., at pp. 100 and 103; and dicta in the English cases of John v John [1898] 2 Ch. 573 at p.576; In b. Pryse [1904] P.301 at p.305, and Re Griggs [1914] 2 Ch.547 at p.552.

be administered unless it is proved that the personal estate is insufficient to pay the intestate's debts, the expenses of his funeral and the costs of administration<sup>1</sup>. If these facts cannot be established, the Court will refuse an application for the grant of administration relating to the real estate or its sale. Thus, in Bangboye v Administrator-General<sup>2</sup>, the West African Court of Appeal set aside the order made by the trial Judge, empowering the sale of the real estate of an intestate, when there was no evidence that his personal estate was insufficient to meet his debts, the expenses of his funeral and the costs of administration.

In granting letters of administration in respect of the real estate of the deceased intestate, the Court is to have regard to the rights and interests of the beneficiaries; and the heir-at-law, if not one of the next-of-kin, is to be equally entitled to the grant of administration with the next-of-kin<sup>3</sup>.

(ii) The Administrator-General's Act<sup>4</sup>

The Administrator-General's Act<sup>4</sup> is designed to apply to the administration of all estates defined as "unrepresented" within the meaning of section 2 of the Act; whether the rights of the beneficiaries thereof are determined under the general law or customary law<sup>5</sup>. The following estates are regarded as unrepresented, and

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1 Ibid, s.3.

2 (1954) 14 W.A.C.A. 616.

3 Ibid, s.3.

4 Cap.4, Laws of the Federation of Nigeria and Lagos, 1958.

5 Op.cit. ss.2 and 31(2).

are administered under the provisions of the Administrator-General's Act:-

- (a) the estate of any person who shall die intestate and whose next-of-kin (or where such next-of-kin is a minor, his guardian) shall be unknown or shall be absent from Nigeria without an attorney therein or if in Nigeria and known, shall have refused or neglected for a period of one month after the death of the deceased to apply to the court for letters of administration;
- (b) the estate of a deceased who shall die having made a will, when owing to any cause it shall be necessary to appoint an administrator cum testamento annexo or de bonis non of such an estate and the person entitled to such letters of administration shall be unknown or shall if in Nigeria and known, refuse or neglect for one month after the death of the testator to apply to the court for such letters or shall be absent from Nigeria without having an attorney therein;
- (c) every estate whereof the executor or administrator shall be absent from Nigeria; and
- (d) every estate where the deceased has named the Administrator-General as the sole executor of his will.

Certain estates which would qualify as unrepresented within the meaning of the Act are, nevertheless, excluded from administration under the provisions of the Act. These otherwise unrepresented estates include those belonging to persons subject to British Military Law<sup>1</sup>; those whose administration is governed by any other Act

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1 Op.cit., part viii, ss.56-61.



or Law<sup>1</sup>; and those of deceased European officers in respect of which the High Court exercises discretion as to whether they should be administered under the Act or not<sup>2</sup>.

The provisions of the Act will now be examined in some detail.

### The Administrator-General

The Administrator-General is the Government official appointed to act as the administrator of estates to which the provisions of the Act apply<sup>3</sup>. He is assisted by other officials known as Assistant Administrators - General<sup>3</sup>. The office of Administrator-General is a corporation sole<sup>4</sup>. He may be appointed the sole executor by any testator<sup>5</sup>.

### Grant and revocation of probate or administration

The Administrator-General may, on becoming aware of any estate he considers unrepresented, apply to the High Court for the granting of probate or letters of administration in respect of such estate<sup>6</sup>. He may, however, for the purposes of preserving such estate, take possession of the property comprised in the estate before ob-

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1 Op.cit., ss.13 and 70.

2 Op.cit., part VII, ss 50-55, especially s.55 (1).

3 S.3 (1).

4 S.3(3).

5 S.9.

6 S.13.

taining the grant of probate or administration relating to the estate<sup>1</sup>. And where there is uncertainty as regards the succession to the estate, he may, of his own accord or on the application of any person interested in the estate, obtain an order of the Court to administer it; and will take possession of any property comprised therein and conduct the administration under the orders of the Court, or in default of any directions by the Court, in accordance with the provisions of the Act<sup>2</sup>. He is, not, like a private administrator, required to enter into an administration bond or furnish security before obtaining the grant of probate or administration<sup>3</sup>. The grant of probate or administration to him is conclusive evidence as to his representative title against all debtors of the deceased, and all persons holding the deceased's property; and affords full indemnity to all debtors paying their debts and all persons delivering up the deceased's property to the Administrator-General<sup>4</sup>. Neither the Administrator-General nor his agent is liable for any act done by him bona fide in the execution of his duties unless such act was done not only illegally but also willfully or with gross negligence<sup>5</sup>.

Any other person who appears in the course of the proceedings connected with the grant of probate or

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1 S.14.

2 S.16.

3 S.8 (2).

4 S.11.

5 S.4.

administration to the Administrator-General and establishes his claim to the estate may be granted the probate or administration thereof, in preference to the Administrator-General<sup>1</sup>. Such a claimant must, however, give such security as may be required of him by law<sup>1</sup>. A private executor or administrator may, by instruction in writing, notified in the Gazette, transfer all the assets comprised in the estate of which he is an executor or administrator to the Administrator-General<sup>2</sup>. Thereupon the transferor will, as from the date of such transfer, be exempt from all liability as such executor or administrator<sup>3</sup>.

A grant of probate or letters of administration already made to the Administrator-General may be revoked in favour of an executor or next-of-kin of the deceased who, within six months of such grant, establishes a claim in preference to that of the Administrator-General<sup>4</sup>. But any costs already incurred in respect of administration by the Administrator-General may be ordered to be paid out of the estate<sup>5</sup>. It is also provided that any acts done by the Administrator-General or his agents in relation to the estate shall be deemed valid notwithstanding the revocation of his grant of probate or administration<sup>6</sup>.

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1 S.17.

2 S.19 (1).

3 S.19 (2).

4 S.20.

5 S.21.

6 S.22.

Powers of the Administrator-General

One of the first duties of the Administrator-General is to take possession of, and preserve the assets comprised in the estate<sup>1</sup>. He must prepare an inventory of all the assets and file it in the Court<sup>2</sup>. He must also cause a notice to be published in the Gazette, calling upon all persons interested in the estate to submit and prove their claims thereto before him within a specified period<sup>3</sup>. Such publication is deemed to be notice to debtors of the deceased, namely those owing him wages or salary, to pay up<sup>4</sup>.

He is required to keep accounts of all receipts, payments and dealings connected with the estate<sup>5</sup>. Any creditor or beneficiary of the estate is entitled, on payment of a prescribed fee, to inspect such accounts and to obtain copies therefrom at all reasonable times<sup>6</sup>.

He is empowered to deposit any moneys received by him from any estate in a Government savings bank, or to invest it in any funds or securities in which trustees are authorised to invest by current English law<sup>7</sup>.

At the expiration of the time set for the submission of the claims by interested persons, he examines

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1 Ss. 14 and 16.

2 S.13.

3 S.25(1).

4 S.25(3).

5 S.32.

6 S.33.

7 S.34(1).

the claims, and may require any claimant to establish his claim on oath<sup>1</sup>. Any person whose claim has been rejected or disallowed in part must commence proceedings to enforce such a claim within two months after notice of rejection or disallowance of such claim has been given, and must prosecute the proceedings without unreasonable delay<sup>2</sup>.

After his determination of all claims of which he has notice, the Administrator-General is empowered to distribute the estate among the successful claimants<sup>3</sup>; and he is not liable for the assets so distributed if any other person comes forward with a claim of which he (the Administrator-General) had no notice at the time of such distribution<sup>4</sup>. But such immunity from liability does not prejudice the right of any creditor or other claimant to follow the assets in the hands of the persons, who may have received them<sup>5</sup>. Where the assets are insufficient to meet the claims of creditors of the estate, payment will be made equally and rateably among creditors, but secured creditors will be preferred<sup>5A</sup>.

Section 39 lays down the order of distribution as follows:-

- (i) costs and expenses incurred in the course of administration;
- (ii) estate duty as may be prescribed by the Treasury;

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1 S.25(1).  
 2 S.27(3).  
 3 S.27(1).  
 4 S.27(2).  
 5 S.27(4).  
 5A S.28(2).

- (iii) creditors of the estate in the order and manner prescribed by law; and
- (iv) beneficiaries legally entitled to the estate.

Where beneficiaries are unknown

If the beneficiaries of the estate are unknown, the Administrator-General is to deposit the proceeds of such an estate in the Treasury pending their being ascertained; but he shall forthwith publish all relevant information relating to the estate in the Gazette, requesting all persons claiming on legal, equitable or moral grounds to present their applications to the Court<sup>1</sup>. As a rule, such applications must be made within two years of the publication in the Gazette, unless the Court fixes a shorter period<sup>2</sup>. Claims based on equitable or moral grounds include those arising from the illegitimacy of the deceased or of his children and grandchildren<sup>3</sup>.

After hearing the claims, the Court may direct the Administrator-General to pay to a successful claimant the sum awarded to him<sup>4</sup>. Where, however, the Administrator-General has already paid the assets into Court following the laying of rival claims<sup>5</sup>, no such direction will be given.

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1 S.42(1).  
 2 S.42(2).  
 3 S.42(7).  
 4 S.43(2).  
 5 S.44.

Assets of estate of negligible value

If the assets of an estate are so small in value as to be practically indivisible among the beneficiaries or creditors entitled thereto, such assets are paid into the Treasury, i.e. to the account of the Government<sup>1</sup>.

Disposal of real property

If, after winding up an estate any real property remains undisposed of, the Administrator-General may apply to the Court for directions as to its disposal; and the Court may order its sale, or may appoint a receiver or make any other order it deems just<sup>2</sup>.

Bona vacantia

All assets paid by the Administrator-General into the Court or deposited in the Treasury, which have not been claimed through the Court and have been in the Court or Treasury for upwards of five years, belong to the Government as bona vacantia.<sup>3</sup> But the Government may, nevertheless, waive its right and distribute such assets among the next-of-kin of the deceased, or any other such persons claiming on equitable or moral grounds<sup>3A</sup>.

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1 S.34(3).

2 S.40.

3 S.45.

3A S.46.

Estates administered in accordance with special provisions of the Act

The Act contains special provisions for the administration of five different categories of estates. These estates are:-

- (i) estates devolving according to customary law<sup>1</sup>;
- (ii) estates of persons not domiciled in Nigeria<sup>2</sup>;
- (iii) estates of deceased European officers<sup>3</sup>;
- (iv) estates of military persons;<sup>4</sup> and
- (v) small estates<sup>5</sup>.

(i) Estates devolving according to customary law

If an estate, or part of it, devolves in accordance with the provisions of customary law, the Administrator-General may apply to a customary court administering such customary law for information as to the distribution. Distribution in accordance with the information so obtained is deemed to be proper administration of the estate; and shall afford the Administrator-General full immunity from liability relating to the administration of such an estate<sup>1</sup>.

As there are no customary courts in the Federal Territory<sup>5A</sup>, the Administrator-General will always apply to the courts in the Regions, when acting under his

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1 S.31(2).

2 S.41(1).

3 Part VII, ss.50-55.

4 Part VIII, ss.56-58.

5 Part IX, ss.59-61.

5A Park, A.E.W., The sources of Nigerian law, 1963, pp.68 and 118; Allott, Judicial and legal systems in Africa (1962) p.47; Nwabueze, The machinery of justice in Nigeria (1963) p.32.



powers under this provision of the Act.

(ii) Estates of persons not domiciled in any part of Nigeria

It will have been observed that the phrase "not domiciled in Nigeria" has been deliberately expanded by the writer to "not domiciled in any part of Nigeria". This has been done in order to cater for the emerging concept of regional domicile as opposed to one Nigerian domicile. There are decisions both for<sup>1</sup> and against<sup>2</sup> a separate domicile in each of the component units of the Federation of Nigeria in respect of jurisdiction in divorce matters. In view, however, of the separate legal system established in each component unit, the cases in support of a

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- 1 Okonkwo v. Eze [1960] N.R.L.R.80; Machi v. Machi [1960] L.L.R.103; Adeoye v. Adeoye [1961] All N.L.R.792; [1962] N.R.N.L.R.63; Adeyemi v. Adeyemi [1962] L.L.R.70; Uchendu v. Uchendu [1962] L.L.R.101. Cf. the Legitimacy Law of the Western Region, cap.62, s.3(1) which provides "... where the parents of an illegitimate person marry or have married one another .... the marriage shall, if the father of the illegitimate person was or is at the date of marriage domiciled in the Region, render that person, if living, legitimate....."
  - 2 Nwokedi v. Nowkedi [1958] L.L.R.94; which, however, must be of doubtful authority in view of the fact that the Judge who decided it now supports the concept of a regional domicile, which he expressed in Adeyemi v. Adeyemi and Uchendu v. Uchendu both of which were decided by him in 1962. Also Udom v. Udom [1962] L.L.R.112; and two cases decided by the High Court of Lagos in 1962 (unreported) to wit: Ettarh v. Ettarh and Odunjo v. Odunjo. For a discussion of these cases, see: Atilade, P.A. "Is there one Nigerian domicile or different regional domiciles in regard to Divorce cases?" Vol.V, (1964) The Nigerian Bar Journal, pp.56-66.

regional domicile seem to be more logical and sensible. Accordingly, we shall refer to a Lagos domicile rather than a Nigerian one in this work....

The proceeds of the estate of a deceased person, who was not domiciled in Lagos at the time of his death, may not be distributed, but paid to the foreign executor or administrator of such a deceased person<sup>1</sup>. Where, however, the beneficiary of the estate resides in a British possession, the Administrator-General may pay the proceeds to the Chief Secretary of such British possession<sup>1</sup>. In the case of a beneficiary residing in a foreign State, payment will be made to the consular officer of such a State<sup>1</sup>.

(iii) Estates of deceased European officers

The administration of the estates of deceased European officers is limited to the collection and realisation of the assets of such deceased officers as are situated in Nigeria; the payment of the funeral and testamentary expenses and debts within Nigeria; and the payment of the residue into the Treasury to the credit of the personal representatives of the deceased officers<sup>2</sup>.

Certain articles (watches, jewelry, letters, etc.,) belonging to solvent deceased officers may not be sold, but sent to the Crown Agents in London for delivery to

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1 S.41(1).

2 S.51(1) and (3).

the deceased officers' personal representatives<sup>1</sup>.

As regards the debts owed by the deceased officers, the Administrator-General may order a stricter method of proof and require creditors to support their claims by affidavit<sup>2</sup>.

It is also the duty of the Administrator-General to pay the net balance of the estate to the Crown Agents on behalf of the legal representatives of the deceased officer.<sup>3</sup>

It is important to observe that the Administrator-General may be precluded from administering the estate of a deceased European officer. This happens when an application is made to the Court for that purpose, or where the Court, of its own motion, so orders<sup>4</sup>. When this happens, some other person may be appointed by the Court to act as administrator<sup>5</sup>.

(iv) Estates of military persons

The personal estates of deceased military persons, or persons subject to British military law, are administered under the British Regimental Debts Act<sup>6</sup>. This is specially provided for in section 56 of the Admini-

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1 S.53.

2 S.51(4).

3 S.54(1).

4 S.55(1).

5 S.55(2).

6 (1893) 56 Vict., c.5.

strator-General's Act, which reads:-

"Nothing in this Act shall be deemed to affect the provisions of the Regimental Debts Act, 1893".

Under the provisions of the Administrator-General's Act, the Administrator-General is empowered to apply to the Court for the grant of administration, limited for the purpose of dealing with the estate in accordance with the provisions of the Regimental Debts Act<sup>1</sup>. If, however, the value of the estate does not exceed one hundred pounds, it will not be necessary for him to apply to the Court for the grant of administration before administering such estate<sup>2</sup>; but he is, nevertheless, bound to carry out his administration in accordance with the provisions of the Regimental Debts Act<sup>1</sup>.

It should be observed that the Regimental Debts Act has extra-territorial application, that is to say, it applies to all persons subject to British military law, wherever they die<sup>3</sup>. The estates of such deceased persons are usually administered by the appropriate committee of adjustment prescribed by the British Sovereign<sup>4</sup>.

Section 2 of the Regimental Debts Act gives the order of the preferential charges on the estate of a

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1 The Administrator-General's Act, cap.4, s.58, ibid.

2 Op.cit., s.57.

3 (1893), 56 Vict., c.5, s.30(1).

4 Op.cit., s.1.

deceased military person as follows:<sup>1</sup>

- (1) Expenses of last illness and funeral;
- (2) Military debts, namely, sums due in respect of, or of any advance in respect of:-
  - (a) Quarters;
  - (b) Mess, band, and other regimental accounts;
  - (c) Military clothing, appointments and equipments not exceeding a sum equal to six months' pay of the deceased, and having become due within eighteen months before his death;to which shall be added, where the death occurs out of the United Kingdom:-
- (3) Servants' wages, not exceeding two months' wages to each servant; and
- (4) Household expenses incurred within a month before the death, or after the last issue of pay to the deceased, whichever is the shorter period.

It is provided in the Act that the decision of the Secretary of State shall be final and binding in case of doubt or difference relating to any preferential charge or the payment thereof<sup>2</sup>.

The net personal estate of a deceased military person which the beneficiaries share is, therefore, the balance after the deduction of the preferential charges

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<sup>1</sup> For the full provisions of the Act, see: The law Reports, Statutes, vol.XXX (1893-4), cap.5, pp.8-17.

<sup>2</sup> The Regimental Debts Act, s.4.

indicated<sup>1</sup>.

(v) Small estates

A small estate is one whose assets do not exceed the sum of fifty pounds<sup>2</sup>. In respect of such estate, the Administrator-General is relieved of the duty to file accounts in the Court unless required to do so by a beneficiary or creditor<sup>3</sup>. If the value of the estate does not exceed ten pounds, the Administrator-General need not give notice in the Gazette of his intention to administer the estate<sup>2</sup>.

He has full powers to determine finally all disputes and questions relating to the administration of small estates, though he has a discretion whether to allow any appeals and applications<sup>4</sup>. He is not strictly bound to receive legal evidence in his determination of claims; but may, in the interests of justice or with a view to saving expense, act on information which appears to him to be credible, though such information is legally inadmissible<sup>5</sup>.

(c) Laws applying only in the Western, Mid-Western and Eastern Regions

In each of the Regions, there is a local statute

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1 Ibid., s.3.

2 The Administrator-General's Act, cap.4, s.60(1), ibid.

3 Op.cit., s.60(3).

4 S.60(5).

5 S.60(6).

which applies to the administration of estates, defined (in precisely the same manner as it has been defined in the Administrator-General's Act) as "unrepresented"<sup>1</sup>. In the Western and Mid-Western Regions, this local enactment is the Administrator-General's Law<sup>2</sup>; while in the Eastern Region, it is the Administrator-General (i.e. without an apostrophe and 's') Law<sup>3</sup>. It will be recalled that the Administration of Estates Law of the Western Region also applies to estates governed by the general law in both the Western and the Mid-Western Regions; but that we have excluded it from our discussion on the ground that it is based substantially on the English Administration of Estates Act.

Both regional Laws, not only contain identical provisions, but are almost entirely based upon the provisions of the Administrator-General's Act. This is not surprising: the Act applied to all the Regions up to 1st October 1960, when the Western Regional Law came into force in that Region<sup>4</sup> and thereafter, it applied to the Eastern Region up to 1st August 1962, when the Law of that Region commenced to apply therein<sup>5</sup>.

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1 Cap.2, s.2, Laws of the Western Region of Nigeria, 1959; Eastern Nigeria Law, No.17 of 1961, s.2; Laws of Eastern Nigeria, 1961, vol.1, All at p.All3.

2 Cap.2, ibid.

3 Eastern Nigeria Law, No.17 of 1961, ibid.

4 W.R.L.N. 317 of 1960 of 18th September 1960; Legislation of the Western Region of Nigeria, 1960, part B, p.473.

5 E.N.L.N. 60 of 1962 of 27th September, 1962; Laws of Eastern Nigeria, 1962, part B, p.118.

TREATMENT OF THE REGIONAL LAWS

No formal attempt is made here to deal with the Regional Laws. It has already been stated that these laws have almost entirely been based on the provisions of the Administrator-General's Act, which has been considered. Reference, therefore, should be made to our discussion of the provisions of this Act.



### CHAPTER THREE

#### THE EFFECT OF A CHRISTIAN OR MONOGAMOUS MARRIAGE ON

#### INTESTATE SUCCESSION

#### SUCCESSION GOVERNED BY THE PROVISIONS OF THE MARRIAGE

#### ACT<sup>1</sup>

#### Christian or monogamous marriage - Definition

The definition of a Christian or monogamous marriage is contained in at least half a dozen Nigerian statutes, namely: the Criminal Code<sup>2</sup>, the Interpretation Act<sup>3</sup> and the Legitimacy Act<sup>4</sup> in force mainly in the Federal Territory of Lagos; and the Western Regional Enactments entitled the Criminal Code<sup>5</sup>, the Interpretation Law<sup>6</sup> and the Legitimacy Law<sup>7</sup>. In these local statutes, a Christian or monogamous marriage is defined as:

"a marriage which is recognised by the law of the place where it is contracted as the voluntary union for life of one man and one woman to the exclusion of all others during the continuance of the marriage".

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1 Laws of the Federation of Nigeria and Lagos (1958), cap.115.

2 Laws of the Federation of Nigeria and Lagos (1958), cap.42, s.1.(1).

3 No.1 of 1964, s.18(1). This Act repealed much of the provisions of the former Interpretation Act, cap.89, op.cit. The unrepealed part of the earlier enactment is now designated as the Law (Miscellaneous Provisions) Act. See: s.28 of No.1 of 1964.

4 Cap.103, s.2, op.cit.

5 Laws of the Western Region of Nigeria (1959), cap.28.s.1.

6 Laws of the Western Region of Nigeria (1959), cap.51,s.3.

7 Cap.62, ibid.,s.2.

This definition is the well-known one given by Lord Penzance in the case of Hyde v. Hyde and Woodmansee<sup>1</sup>. It follows that a Christian marriage is not necessarily confined to one celebrated in accordance with the rites of the Christian Church; but extends to any system of marriage that enjoins monogamy. Thus, while two Moslems contracting a marriage under a system that knows of one man and one wife only, would qualify under the definition of a Christian marriage; two Christians, however ardent their belief in the faith may be, marrying under a system permitting of a plurality of wives or husbands would fall outside the pale of this definition.

Christian or monogamous marriage celebrated in accordance with the provisions of the Marriage Act<sup>2</sup> compared with that not so celebrated: different rules relating to intestate succession

Any Christian or monogamous marriage contracted in Nigeria must be celebrated in accordance with the provisions of the Marriage Act<sup>2</sup>, which is <sup>the</sup> lex loci celebrationis<sup>3</sup>.

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1 (1866) L.R.1 P. & D.130 at p.133.

2 Laws of the Federation of Nigeria and Lagos (1958), cap.115.

3 On this, see: Dicey, A.V., Conflict of laws (1958) 7th edn., chap.11, esp. pp.231-7; Cheshire, G.C. Private international law (1961), 6th edn., chap. XI, esp. pp.330-49; Graveson, R.H., Conflict of laws (1960), 4th edn., chap. 6, esp. pp.151-4; also Coker, Family property among the Yorubas (1958), pp.253 ff.

A marriage contracted outside Nigeria, which satisfies the definition given above, is regarded as a Christian or monogamous marriage<sup>1</sup>. One result of this distinction is, as will be shown more fully later, that in the case of the marriage contracted under the Marriage Act<sup>2</sup>, section 36 of that Act governs the intestate succession of the spouses and issue of such marriage; while in the case of a Christian or monogamous marriage not celebrated under the provisions of the Marriage Act<sup>2</sup>, some other general law governs the intestate succession; with the further result that the rights of the intestate's children to his real property may not be equal, and those of the Crown or State may remain unaffected in the event of there being no heir or next of kin to take.

In this regard, the position in Ghana should be noted. There, the provisions of the Marriage Ordinance relating to intestate succession under the general law

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- 1 On this, see: Dicey, A.V., Conflict of laws (1958), 7th edn., chap.11, esp. pp.231-7; Cheshire, G.C. Private international law (1961), 6th edn., chap XI, esp. pp.330-49; Graveson, R.H. Conflict of laws (1960), 4th edn., chap.6, esp. pp.151-4; also Coker, Family property among the Yorubas (1958), pp.253 ff.
  - 2 Laws of the Federation of Nigeria and Lagos (1958), cap.115.

apply irrespective of the country in which the intestate's marriage had been contracted.<sup>1</sup>

The provisions of section 36 of the Marriage Act<sup>2</sup>

Section 36 of the Marriage Act<sup>2</sup> provides as follows:

- (1) "Where any person who is subject to native law or custom contracts a marriage in accordance with the provisions of this Act, and such person dies intestate, subsequently to the commencement of this Act, leaving a widow or husband, or any issue of such marriage; and also where any person who is the issue of any such marriage as aforesaid dies intestate subsequently to the commencement of this Act -

The personal property of such intestate and also any real property of which the said intestate might have disposed by will, shall be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estates,...., any native law or custom to the contrary notwithstanding: provided that -

- (a) where by the law of England any portion of the estate of such intestate would become a portion of the casual hereditary revenues of the Crown, such portion shall be distributed in accordance with the provisions of native law and custom, and shall not become a portion of the said casual hereditary revenues; and
- (b) real property, the succession to which cannot by native law or custom be affected by testamentary disposition, shall descend in accordance with the provisions of such native law or custom, anything herein to the contrary notwithstanding.

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1 The Marriage (Ghana) Ordinance, cap.127, s.48(1); also, Ollennu, N.A., The law of succession in Ghana (1960), pt.X, pp.42-52.

2 Laws of the Federation of Nigeria and Lagos (1958), cap.115.

- (2) Before the registrar of marriages issues his certificate in the case of an intended marriage, either party to which is a person subject to native law or custom, he shall explain to both parties the effect of these provisions as to the succession to property as affected by marriage.
- (3) This section applies to the Colony only."

Some comments on this section of the Act

"Native law and custom" or "native law or custom"

There seems to be some error in the use of the term by which customary law is referred to in the section. Apart from paragraph (a) of subsection (1), where the alternative and correct term native law and custom is employed, the section attempts to separate law from custom by the use of the term native law or custom. It is submitted that the correct term is either customary law or native law and custom. It has been aptly said that " 'native law and custom' is .... a single inseparable phrase, and it is incorrect to attempt to give separate meanings to 'law' and 'custom' here" <sup>1</sup>.

The courts will, no doubt, construe the conjunction "or" between law and custom as meaning "and", since it is a rule of construction that "in order to carry out the

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<sup>1</sup> Allott, A.N., Essays in African law (1960), pp.165-6, cf. Coker, G.B.A., Family property among the Yorubas (1958), pp.6-7.

intention of the legislature, it is occasionally found necessary to read the conjunctions 'or' and 'and' one for the other" (1)

This means that the legislature must be taken to have intended that the correct term should be native law and custom, and not native law or custom.

Area of application of section 36 of the Marriage Act

Subsection (3) of the section itself limits its application to the Colony of Nigeria<sup>2</sup>, of which the present Federal Territory of Lagos was an important part<sup>3</sup>. The constitutional changes which took place in 1954<sup>4</sup>, however, resulted in the transfer to the Western Region of a considerable portion of the territory formerly comprised in the Colony of Nigeria<sup>5</sup>. The question which

- 1 Maxwell, Interpretation of statutes (1962), 11th edn., pp.229-31; Odgers, C.E., The construction of deeds and statutes (1952), 3rd edn., pp.275-6; also R.V. Eze (1950) 19 N.L.R.110; Adelabu and anor. v. Inspector-General of Police [1955-6] W.N.L.R.7 at p.10, and the authorities considered therein.
- 2 For the extent of the former Colony, see: The Colony of Nigeria Boundaries Order in Council (1913), Rev.XVI, p.885, S.R. & O. (1913), p.2393; also Laws of the Western Region of Nigeria (1959), vol.VII, pt.v, pp.385-8; Laws of the Federation of Nigeria and Lagos (1958), vol.XI, pp.218-221; The Nigeria handbook (1936), 11th edn., p.28.
- 3 The total area of the Federal Territory of Lagos is only 27 square miles. See: Davies, H.O., Nigeria: the prospects for democracy (1961) p.13; The Federation of Nigeria (1963) p.19, published by the Commonwealth Institute; Burns, A.C., History of Nigeria (1963), 6th edn., p.17. The Nigeria Year Book (1964) p.11.
- 4 See: Nigeria (Constitution) Order in Council, 1954, S.I.No 1146.
- 5 The areas so transferred include Epe, Badagry and Ikeja.

immediately arises is whether the provisions of section 36 of the Marriage Act continue to apply in those parts of the former Colony now included in the Western Region; or whether their operation is limited to that area of the old Colony now constituting the Federal Territory of Lagos.

Two learned authors have recently expressed the view that the section applies only in the Federal Territory of Lagos<sup>1</sup>. The present writer shares this view; and, as the authors have not indicated the ground on which their eminently sensible view has been based, he proposes to advance reasons to justify the view expressed.

It should be pointed out that the answer to this question, which is a constitutional issue, must depend upon the legislative competence of the Federal Parliament

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4 .... The constitutional arrangements involved the old Colony of Nigeria in the loss of 1,354 square miles of its former territory, having an area of 1,381 square miles. But the old municipality of Lagos, having an area of 24 square miles, gained in the process - 3 square miles! See notes 2 and 3 on p. 57.

1 Obi, The Ibo law of property (1963), pp.211,213 and 219-20; Park, The sources of Nigerian law (1963), p.133 n.

and that of the Western Regional legislature with respect to the topic of intestate succession under the general law. It is, of course, true that the subject of Christian or monogamous marriage, including the related topics of annulment, dissolution and matrimonial causes under the general law, is one of the matters over which the Federal Parliament has exclusive legislative powers<sup>1</sup>. But succession is not one of the matters so exclusively assigned to the Federal Parliament. In point of fact, it is not even a topic appearing on the Concurrent Legislative List<sup>2</sup>; nor is it one of those items not included in the Legislative Lists, but in respect of which an Act of Federal Parliament nevertheless has the effect of nullifying a Regional Law to the extent of any inconsistency contained in the latter enactment<sup>3</sup>. It follows, therefore, that succession is one of the matters in regard to which the Regions are competent to legislate. That this is the true position and that section of 36 of the Marriage Act dealing with intestate succession does not apply in the

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1 Item 23 of part I of the schedule to the Constitution of the Federal Republic of Nigeria, No.20 of 1963 (the Exclusive Legislative List).

2 Part II of the schedule, ibid.

3 S.69 of the Constitution of the Federal Republic of Nigeria.



Western Region may be seen from the enactment in the Region of legislation providing for intestate succession under the general law<sup>1</sup>.

Basis of the application of section 36 in the Federal Territory of Lagos: Place of marriage, domicile or situation of property?

The topic now canvassed is this: granting that the deceased intestate (a person subject to customary law) married under the Marriage Act and dies, leaving a widow or husband or issue of the marriage; or he is himself an issue of such marriage; what connection must he and/or his property have with the Federal Territory of Lagos in order to attract the operation of the provisions of section 36 of the Marriage Act? In other words, is it the fact of the celebration of his marriage in Lagos, or his Lagos domicile, or his having left property situated therein that brings into operation the provisions of the section? We shall take the different parts of the question one by one. As a general point, however, it may be observed that, apart from providing that it "applies to the

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1 The Administration of Estates Law, cap.1, Laws of the Western Region (1959), with effect from 23rd April, 1959.

Colony only"<sup>1</sup>, the section does not offer any help with respect to the solution of the problem posed.

(a) Celebration of marriage in Lagos

The mere fact that the deceased intestate contracted a marriage under the Marriage Act in Lagos is of itself insufficient to bring his succession within the provisions of section 36 of the Act. This is so because, under the rules of private international law, the lex loci celebrationis has nothing to do with the intestate succession of a married deceased person; but is concerned with whether or not the formalities of the marriage have been complied with<sup>2</sup>.

(b) Lagos domicile of the deceased intestate

Up till the time of the constitutional arrangements referred to above, it was perfectly safe to speak of one common Nigerian domicile, since the Colony and Protectorate of Nigeria enjoyed a common legal system. Since then, however, the concept of a separate domicile - at least in divorce matters - in each of the constituent parts of the

<sup>1</sup> Subsection (3) of the section.

<sup>2</sup> Cheshire, G.C., Private international law (1961), 6th edn., chap. XI, esp. pp.330-49; Graveson, R.H., Conflict of laws (1960), 4th edn, chap. 6, esp. pp.151-4; Dicey, A.V., Conflict of laws (1958), 7th edn, chap.11, esp. pp.231-7.

country has emerged<sup>1</sup>; though decisions to the contrary are not lacking<sup>2</sup>. Having regard to the existence of a separate legal system in each of the Regions and the Federal Territory comprising the Federation of Nigeria, and the fact that domicile is geared to a territory over which a single legal system operates, the decisions in favour of a regional - as opposed to one Nigerian - domicile appear to be more logical<sup>3</sup>.

If the deceased intestate was domiciled in the Federal Territory of Lagos at the date of his death, the succession to his movable property is governed by the provisions of the section. This is in accordance with the principles

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- 1 Okonkwo v. Eze [1960] N.R.N.L.R.80; Machi v. Machi [1960] L.L.R.103; Adeoye v. Adeoye [1961] All N.L.R. 792; [1962] N.R.N.L.R.63; Adeyemi v. Adeyemi [1962] L.L.R.70; Uchendu v. Uchendu [1962] L.L.R.101. Cf. the Legitimacy Law of the Western Region which contains a provision referring to Western Region domicile: Laws of the Western Region of Nigeria (1959), cap.62, s.3(1).
  - 2 Nwokedi v. Nwokedi [1958] L.L.R.94; which, however, must now be regarded as rather doubtful authority having regard to the fact that the judge who decided it also decided the later cases of Adeyemi v. Adeyemi and Uchendu v. Uchendu cited in footnote 1 above. Also Udom v. Udom [1962] L.L.R.112; including two unreported cases decided by the High Court of Lagos: Ettarh v. Ettarh, suit HD/23/63; Odunjo v. Odunjo, suit WD/42/62. For a discussion of these cases, see: Atilade, P.A., "Is there one Nigerian domicile or different regional domiciles in regard to Divorce cases?", (1964), vol.V, The Nigerian Bar Journal pp.55-66.
  - 3 See: Cheshire, G.C., Private international law (1961), 6th edn., chap.VII; Graveson, R.H., The conflict of laws (1960), 4th edn., chap.4; Dicey, A.V., Conflict of laws, (1958), 7th edn., chap.6.

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of private international law<sup>1</sup>. On the same principles, the succession to his movable property will fall outside the ambit of the section, if he died intestate domiciled elsewhere, say, in one of the Regions.

(c) Situation of property in Lagos

(i) Movable property

On the principles of conflict of laws already referred to above, the situation of the movable property of the deceased intestate within the Federal Territory of Lagos is not enough to bring the succession to such property within the provisions of the section; unless he was also domiciled therein at the time of his death.

(ii) Immovable property

Where the property of the deceased intestate is immovable and is situated within the Federal Territory of Lagos, the provisions of the Act will govern the devolution. This is because under the principles of private international law, succession to immovables is determined by the lex situs<sup>2</sup>.

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1 Cheshire, op.cit., pp.559 ff; Graveson, op.cit., pp.419-20; Dicey, op.cit., pp.598-600; and the cases cited therein by the authorities.

2 See: Cheshire, op.cit., pp.603 ff; Graveson, op.cit., pp.422-3; Dicey, op.cit., pp.496-8, and 518; also Coker, Family property among the Yorubas (1958), pp.250-1.

### Personal property and real property

The exact terms employed in the section are personal property and real property, and not the private international law terms of movables and immovables<sup>1</sup>. Nevertheless, this makes no difference, since it is specifically provided in the section that

"the personal property ..... and also any real property... shall be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estates....." 2.

### Date for the application of the relevant English law

Subsection (1) of section 36 of the Marriage Act provides that the distribution of the intestate's property is to be "in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates";

but does not specify the date with respect to the applicable English law. The omission of the date for the application of the relevant English law occurring in the Nigerian Marriage Act may be contrasted with the position in Ghana, where the date 19th November, 1884, has been expressly mentioned in the Ghana Marriage Ordinance itself<sup>3</sup>.

1 See: Cheshire, op.cit., pp.603 ff.; Graveson, op.cit., pp.422-3; Dicey, op.cit., pp.496-8 and 518; also Coker, Family property among the Yorubas (1958), pp.250-1.

2 Subsection (1) of section 36 of the Marriage Act.

3 The Marriage (Ghana) Ordinance, cap.127, s.48(1).

The question which now falls for consideration is the date for the application of the relevant English law incorporated by reference in section 36 of the Marriage Act. Two learned authors have suggested the year 1884<sup>1</sup>; and one has sought to justify this date on the ground that the first Marriage Ordinance was passed in that year<sup>2</sup>. With respect, the date suggested by both learned authors is not the correct one. For, while it is undoubtedly true that the Ordinance was passed in 1884<sup>3</sup>, its provisions did not come into force until 31st December, 1885<sup>4</sup>. As regards the ground on which one of the learned authors has relied for ascertainment of this wrong date [i.e. that the first Marriage Ordinance in Nigeria was enacted in 1884], it is respectfully submitted that this view is clearly untenable. This is because the Ordinance of 1884<sup>3</sup> was, in point of fact, the third piece of legislation to deal with Christian or monogamous marriage in the country; and it repealed two earlier enactments on the subject. These earlier local statutes were the Ordinance " to provide for the granting

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1 Coker, Family property among the Yorubas (1958) p.250; Ollennu, The law of succession in Ghana (1960) p.43.

2 Coker, loc.cit.

3 No.14 of 1884. See: Laws of the Colony of Lagos in force 1893, pp.444-59; Laws of the Colony of Lagos (1901), vol.1, pp.455-69.

4 By Government Notice No.53 of 1885, published in the Gazette (Gold Coast.) See Laws of the Colony of Lagos in force 1893, p.469.

of Licences for Marriages in the Settlement of Lagos, and its Dependencies (1)"

and the Registration Ordinance relating to the

"Registration or Solemnization of Marriages within the said Settlement (2)".

Perhaps the learned author meant to say that the Ordinance of 1884 was the first Marriage Ordinance to contain provisions relating to intestate succession<sup>3</sup>. But this is quite a different thing from saying that the first Marriage Ordinance in Nigeria was passed in 1884.

Furthermore, the date suggested by both learned authors fails to take into account two important considerations. One is that the Ordinance of 1884 was itself repealed in 1914<sup>4</sup>, when the provisions of the present Marriage Act<sup>5</sup> came into force<sup>6</sup>. The other is the effect of

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1 No.10 of 1863. See the Laws cited in footnote 3 on p.65.

2 No.21 of 1863, ibid.

3 These provisions were then embodied in S.41 of the Ordinance which, however, did not limit them to the Colony of Lagos. See also, Fowler v. Martins (1924) 5 N.L.R.45, esp. at p.47.

4 By the Marriage Ordinance, No.18 of 1914, s.56. See: Ordinances, Orders and Regulations of Nigeria, 1914.

5 The provisions of the Marriage Ordinance (1914) have, with minor amendments, which are not relevant to our discussion, since appeared in successive editions of the Laws of Nigeria. For example, they were embodied in cap.68 of the 1923 edition of the Laws; in cap.128 of the 1948 edition; and in cap.115 of the current edition.

6 The provisions of the Marriage Ordinance (1914) have been in force since the 31st December, 1914. See: Ordinances, Orders and Regulations of Nigeria, 1914.

the judicial authorities on the point, which have established that the material date is to be ascertained with reference to the English law in force at the date of the commencement of the particular Marriage Ordinance in accordance with which the intestate's marriage had been contracted. Before proceeding to the examination of the judicial authorities on the point, however, it may be observed that another learned author has, somewhat independently, arrived at the conclusion to be drawn from the decided cases<sup>1</sup>.

In Johnson v. The United Africa Company Ltd.<sup>2</sup>,

Butler Lloyd, J. was of the opinion that the English law referred to in section 36 of the Marriage Act was the law in force in 1914, when the existing enactment came into force.<sup>3</sup> With respect, this decision is suspect, since there was no shred of evidence indicating the date when the deceased intestate contracted his marriage under the general law<sup>4</sup>. However, it has been held by the West African Court of (Appeal

1 Obi, The Ibo law of property (1963) p.221, where he states that the English law to be applied is "the law in force in England in 1914 when the Marriage Ordinance was enacted". But this statement is correct only in so far as it relates to persons married under the Marriage Ordinance of 1914; and not in respect of those married in accordance with the provisions of the earlier Ordinance of 1884.

2 (1936) 13 N.L.R.13.

3 Ibid. at p.14.

4 The first page of the report - (1936) N.L.R.13 - contains only the following relevant facts: "A.S. Johnson and ..



in Re Somefun<sup>1</sup>, where there was abundant evidence to the effect that the marriage concerned was celebrated under the Marriage Ordinance of 1914, that the English law to be applied by virtue of section 36 is "the law of England (at the time of the Ordinance) relating to the distribution of the personal estate of intestates....(2)".

The case did not make it clear what meaning must be attached to the phrase at the time of the Ordinance. Did this mean at the commencement or during the continuance of the enactment? This question was expressly answered in Re Adadevoh and ors.<sup>3</sup> by the same Court which, as will be shown more fully later, overruled on other grounds, its earlier decision in Re Somefun<sup>1</sup>. In the later case, the Court ordered that the estate of the deceased intestate who had married under the Ordinance of 1914 should be distributed "in the manner and to the extent prescribed by the Statute of Distributions in force in England at the date of the commencement of the Ordinance.....(4)"

The clearest statement in this regard - that the

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4 ..... Dorcas Johnson were married in accordance with the Marriage Ordinance. He died intestate in 1926 leaving her and four children surviving".

1 (1941) 7 W.A.C.A.156.

2 Ibid, at p.157.

3 (1951) 13 W.A.C.A. 304.

4 Ibid, at p.310.

applicable law is the English law in force at the date of commencement of the marriage enactment under which the particular marriage was contracted - was made in the celebrated decision of the Privy Council in Bamgbose v. Daniel and ors.<sup>1</sup>, where even the West African Court of Appeal erred in the fixing of the relevant date - 1914 instead of 1884<sup>2</sup>. The Board endorsed the agreement reached between the parties that it was the Ordinance of 1884 that fell to be considered, since "the marriage of the deceased's parents was contracted under that Ordinance"<sup>2</sup>. As regards the content of the relevant English law applicable, Lord Keith of Avonholm, who delivered the judgement of the Board, observed:

"The relevant law of England in 1884 is to be found in the Statute of Distribution, 1670 (22 & 23 Car.II c.20)<sup>3</sup> and the Act of 1685, 1 Jac.II c.17"(4)

An interesting point emerging from the decisions briefly examined is the hypothetical question of the English law that would apply in cases of the intestate

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1 (1954) 14 W.A.C.A.116; [1954] 3 All E.R.263; [1955] A.C.107.

2 Ibid., at p.118; p.265; and p.114 respectively.

3 This is, of course, c.10, since cap.20 is entitled an Act "for the relief and release of poor distressed prisoners for debt." See: Statutes at large, vol.8, 12 Cha.II to I James II, p.368.

4 Ibid., at p.119; p.266; and p.115 respectively.

succession of persons marrying since 1958, if in that year [i.e. when the current edition of the Laws of the Federation of Nigeria and Lagos was compiled] the existing Marriage Act - the Ordinance of 1914 - had been replaced by new legislation embodying the provisions relating to intestate succession now contained in section 36 of the present Marriage Act. There is no doubt that the provisions of the Administration of Estates Act and the Intestates' Estates Act would have applied in respect of the intestate succession of persons marrying under the Marriage Act of 1958, since both Acts would be the English law in force at the date of the commencement of the Act under which such persons had married.

General statutory provisions relating to the reception and application of English law

A word must be said about the effect of the general statutory provisions relating to the reception and application of English law which had been in existence with respect to Lagos since 1863<sup>1</sup>. The current provisions specify the 1st January, 1900, as the relevant date for the application of English law; and also state that the application of

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1 Ordinance No.3 of 1863, s.1. See: Ordinances of the Settlement of Lagos, 1862-70, pp.10-11.

that law is subject to the existence of other provisions contained in any Federal law, and is conditional on local circumstances permitting.

Thus, subsections (1) and (2) of section 45 of the Law (Miscellaneous Provisions) Act<sup>1</sup> read as follows:

- "(1) Subject to the provisions of this section, and except in so far as other provision is made by any Federal law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall be in force in Lagos.....
- (2) Such Imperial laws shall be in force so far only as ..... local circumstances shall permit and subject to any Federal law."

It seems rather remarkable that the statutory provisions reproduced above were not considered in any of the cases dealing with the relevant date for the application of the English law referred to in section 36 of the Marriage Act. It is, however, submitted that the date 1900 mentioned in the general statutory provisions as regards the reception and application of English law would not have made any difference, especially in respect of the cases in which the date has been put at the year 1914: the relevant English law, as it stood at both dates,

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1 This is the title by which the unrepealed part of the former Interpretation Act - cap. 89, Laws of the Federation of Nigeria and Lagos 1958 - is now referred to. See: The Interpretation Act, No.1 of 1964, s.28.

was the same; and was to be found in the Statutes of Distribution, 1670<sup>1</sup> and 1685<sup>2</sup>; the Statute of Frauds<sup>3</sup>, and the Intestates' Estates Act<sup>4</sup>.

Furthermore, it is difficult to see how the general provisions dealing with the reception date and application of English law could have affected the decisions based on the interpretation of the special provisions embodied in section 36 of the Marriage Act, having regard to the rule of construction expressed in the maxim generalia specialibus non derogant<sup>5</sup>.

The provisions of the High Court of Lagos Act<sup>6</sup> empowering the Court to exercise its jurisdiction in probate, divorce and matrimonial causes and proceedings in conformity with current English law and practice

One other aspect of the reference date with respect to the application of English law under section 36

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1 22 & 23 Car.2, c.10.

2 1 Jac.2, c.17.

3 (1677), 29 Car.2, c.3.

4 (1890), 53 & 54 Vict., c.29.

5 On this, see: Maxwell, op.cit., pp.168-77; Odgers, op.cit., pp.220 and 264.

6 Laws of the Federation of Nigeria and Lagos (1958), cap.80.

of the Marriage Act remains to be considered. This is in connection with the provisions of the High Court of Lagos Act<sup>1</sup> by virtue of which the Court may exercise its jurisdiction in probate causes and proceedings, among others, "in conformity with the law and practice for the time being in force in England<sup>2</sup>". These provisions by which English law as it changes from time to time has been incorporated by reference in the High Court of Lagos Act<sup>1</sup>, and which empower the Court to apply current English law in probate causes and proceedings raise the all-important topic of the meaning to be attached to the expression probate causes and proceedings. In other words, do such causes and proceedings include the distribution of estates or are they limited to the proof of wills and granting of letters of administration? The answer to the question depends on the meaning assigned to that expression in the High Court Act itself; or anywhere else, in the event of there being no definition or clear definition of that expression in the Act. But, first it will be necessary to reproduce the section of the Act embodying the provisions by

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1 Laws of the Federation of Nigeria and Lagos(1958), cap.80.

2 Ibid, s.16.

virtue of which the High Court may exercise its jurisdiction in probate causes and proceedings in conformity with current English law and practice.

Section 16 of the High Court of Lagos Act<sup>1</sup> provides:

"The jurisdiction of the High Court in probate, divorce and matrimonial causes and proceedings may, subject to the provisions of this Act and in particular to section 27 [i.e. the section dealing with the observance and enforcement of any applicable rules of the customary law] and subject to rules of court, be exercised by the court in conformity with the law and practice for the time being in force in England."

It is significant that the definition of the expression probate causes and proceedings is not contained in the High Court Act or in the Rules of Court<sup>2</sup>; nor, indeed, as we shall see, in the relevant English legislation. However, the similar provisions contained in the forerunner of the present High Court of Lagos Act - the Supreme Court Ordinance<sup>3</sup> - throw some light on the question. Like the High Court of Lagos Act and the Rules of Court, the Supreme Court Ordinance is silent on the definition of the expression probate causes and proceedings.

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1 Laws of the Federation of Nigeria and Lagos(1958), cap.80.

2 The Rules of Court at present in use are the old Supreme Court Rules - The Supreme (Civil Procedure) Rules - which are contained in vol.10, cap.211, Laws of Nigeria (1948); and which have been expressly retained by virtue of s.89(3) of the High Court of Lagos Act, cap.80, op.cit.

3 See: Laws of Nigeria (1948), cap.211. The relevant provisions are contained in section 22 of the Ordinance.

Nevertheless, it (the Supreme High Court Ordinance<sup>1</sup>) affords some help with respect to the solution of the problem by referring us to section 20 of English Supreme Court of Judicature (Consolidation) Act<sup>2</sup>, to which we must now turn for guidance.

We may repeat that the Supreme Court of Judicature (Consolidation) Act<sup>2</sup> has not attempted any formal definition of the expression under consideration. However, the scope of the topics dealt with in part VII (sections 150-175) - headed probate causes and matters - of the English legislation<sup>2</sup> leaves no doubt as to the import of the expression: probate causes and matters are concerned with proof of wills and the grant of letters of administration; but do not extend to the distribution of estates.

Before concluding this discussion, however, one or two comments may be made on the very recent decision of the High Court of Zambia (Northern Rhodesia) in the case of In the Estate of Ntonga<sup>3</sup>, which involved the interpreta-

1 Cap.211, s.22, Laws of Nigeria (1948).

2 (1925) 15 & 16 Geo.5, c.49.

3 The case is noted in [1964] J.A.L.41-6.



tion to be put on the expression probate causes and matters contained in the High Court Ordinance of Zambia by virtue of which the Court is to exercise its probate jurisdiction in conformity with current English law and practice<sup>1</sup>. The facts of that case were briefly as follows: the deceased died intestate leaving no issue. He was, however, survived by his parents, one of whom - the father - applied for the grant of letters of administration in respect of the deceased's estate. The applicant stated in the administrator's oath he filed that he was the lawful father of the deceased, and "one of the persons entitled to share"<sup>2</sup> in the estate. As will be shown more fully later, the applicant's statement was correct, if the current English law of intestacy applied, while it was not correct if the pre-1925 English rules of intestate succession governed the distribution. The relevance of the pre-1925 English rules of intestate succession will be understood when it is realised that Zambia has general statutory provisions by virtue of which English law, as it stood

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1 The High Court [Zambia] Ordinance, cap.3,s.11.

2 [1964] J.A.L.41 at p.42.

on the 17th August, 1911, applies in the territory<sup>1</sup>.

The decision turned on the interpretation of the phrase probate causes and matters in the relevant section of the High Court Ordinance of Zambia enjoining the Court to exercise its probate jurisdiction in conformity with the law and practice for the time being in force in England.

Conroy, C.J., while specifically refraining from "deciding .... that the expression 'probate causes and matters' does not include the distribution of the estates of deceased" (2)

nevertheless applied the current English law under which the estate was to be held in trust for both of the deceased's parents in equal shares. In other words, he held that the oath of administration filed by the deceased's father, to the effect that he was one of the beneficiaries, was in proper form.

With the greatest respect, the decision appears to be inconsistent with the expressed determination of the learned Chief Justice not to decide the vital point of whether the phrase probate causes and matters is limited

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1 This is now contained in the English Law (Extent of Application) Ordinance, 1963. See: Laws of Zambia [Northern Rhodesia], 1964 edn, cap.11, s.2.

2 [1964] J.A.L. 41 at p.46.

to proof of wills and the grant of administration; or is broad enough to cover the distribution of estates. For, by deciding, as he did, he had indirectly held that that phrase must be taken to include the distribution of estates, which, as has been pointed out, is not the case. The effect of the decision was, however, short-lived. The legislature amended the relevant section of the High Court Ordinance shortly after the case was decided; and the English law to be applied in these causes and matters is that in force on the general reference date - 17th August 1911<sup>1</sup>.

But the decision had two redeeming features. Firstly, the amendment of the law by the legislature, referred to above, was the result of the appeal made by the learned Chief Justice during the course of his judgement. He said:

"If the true position is the absurd one that two entirely different systems of law apply, according to whether the High Court of Northern Rhodesia is trying a Probate matter or a Chancery matter, then the sooner the legislature enacts legislation to clarify the issue the better".(2)

As has been indicated, legislative action in this regard followed speedily. Secondly, by applying the current

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1 Ibid. at p.43.

2 [1964] J.A.L. 41 at p.46.

English law, the learned Chief Justice made it possible for the deceased's mother to benefit from the estate which, as we shall see, would have descended to the applicant (the father) exclusively.

The final point in connection with the application of the current English law in probate causes and matters in Nigeria is the existence of the Rules of Court referred to in section 16<sup>1</sup> of the High Court of Lagos Act; and which exclude or, at all events, limit the application of the law for the time being in force in England. Like the provisions of part VII (sections 150-175) of the English Supreme Court of Judicature (Consolidation) Act,<sup>2</sup> the relevant Order<sup>3</sup> of the Rules of Court is headed probate causes and matters; and deals wholly with topics relating to proof of wills and the grant of administration. For example, Rule 1 of the Order<sup>3</sup> speaks of petitions "for the granting of any probate of the will, or for letters of administration of the estate of the deceased person"; the next three Rules are concerned with the interim

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1 That is the section containing provisions receiving the current English law and practice in probate causes and proceedings.

2 (1925) 15 & 16 Geo.5, c.49.

3 Order XLVIII of the Supreme Court (Civil Procedure) Rules, vol.10, cap.211, Laws of Nigeria, 1948.

preservation of the property comprised in the estate, and the production of the testamentary documents of the deceased, if any; while Rules 20 to 33 deal with the actual process of administration.

We may now proceed to summarise what has been discussed with regard to the date for the application of the relevant English law referred to in section 36 of the Marriage Act. The applicable English law is the law in force in England at the date of the commencement of the particular Marriage Ordinance under which the deceased intestate had contracted his marriage. It is neither the English law in force on the 1st January, 1900 - the general reference date contained in the provisions of section 45 of the Law (Miscellaneous Provisions) Act - nor the current English law referred to in section 16 of the High Court of Lagos Act, which deals with the jurisdiction of the Court in probate, divorce and matrimonial causes and proceedings.

#### PERSONS SUBJECT TO CUSTOMARY LAW

The section applies only to the intestate succession of a person who is subject to customary law and who married under the Marriage Act; or who, as will be fully examined later, is an issue of such a marriage<sup>1</sup>. Now,

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1 Subsection (1) of the section.

the only persons who are subject to customary law are natives, defined by a repealed section of the former Interpretation Act<sup>1</sup> to include a native of Nigeria and a native foreigner. The section reads:<sup>2</sup>

" 'native' includes a native of Nigeria and a native foreigner; 'native of Nigeria' means any person whose parents were members of any tribe or tribes indigenous to Nigeria and descendants of such persons; and includes any person one of whose parents was a member of such a tribe; 'native foreigner' means any person (not being a native of Nigeria) whose parents were members of a tribe or tribes indigenous to some part of Africa and the descendants of such persons, and shall include any person one of whose parents was a member of such tribe".

Although the definition of the term "native" has disappeared with that part of the former Interpretation Act<sup>1</sup>, which has been repealed<sup>3</sup>, the term is still retained in both the High Court of Lagos Act<sup>4</sup> and the Magistrates' (Lagos) Court Act<sup>5</sup>. It is submitted that the courts, in interpreting the term under the Acts establishing them, are entitled to refer to the definition contained in the

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1 Cap.89, Laws of the Federation of Nigeria and Lagos (1958).

2 Ibid, s.3.

3 The repealing enactment is entitled the Interpretation Act, No.1 of 1964. This Act leaves unrepealed part of the former Act, which is now designated as the Law (Miscellaneous Provisions) Act: s.28 of the Interpretation Act, No.1 of 1964.

4 Cap.80, s.27, ibid.

5 Cap.113, s.22, ibid.

repealed provisions of the former Interpretation Act. It is also submitted that the definition of "native" is broad enough to cover both West Indians of African origin and American Negroes, since they are descendants of persons who were members of tribes indigenous to Africa. It would, however, not cover Europeans or Asians who are naturalised citizens of Nigeria or who are domiciled in Lagos. Accordingly, the intestate succession of such Europeans and Asians marrying under the Marriage Act falls outside the ambit of the provisions of section 36. The rules governing the distribution in such cases will be dealt with in the next chapter.

The absurdity of the effect of the provisions of the section: Succession to the spouses qualified; that in respect of issue of the marriage absolute.

In the case of a deceased intestate married under the Marriage Act, the provisions of section 36 apply only if he or she (being, of course, subject to customary law) leaves a widow or husband or issue of the marriage surviving. As regards the succession to the issue of the marriage, however, there is only one condition precedent to the application of the provisions of the section,

namely, the issue dying intestate; and it matters not whether he or she is survived by a widow or husband or issue; or whether, indeed, he or she was married under the Marriage Act or entered into a customary union.

If one takes the contractual view of the method by which the change in succession is brought about, the manifest absurdity revealed by the provisions of section 36 would require no further demonstration. For, while the succession to an actual party to the contract of marriage is qualified; that to an issue of the marriage, who ex hypothesi could not be a party to the contract of marriage, is absolute. The position becomes all the more intolerable when one considers that there exists no impediment to the issue's contracting a marriage under customary law<sup>1</sup>.

Widow or husband or issue under section 36

The section qualifies the words widow or husband or issue as being those of a marriage contracted in accordance with the provisions of the Marriage Act.

Despite the doubt expressed by a learned author as to

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1 See: Bamgbose v. Daniel and ors. (1954) 14 W.A.C.A. 116 at p.120 [1954] 3. All E.R. 263 at p.267; [1955] A.C. 107 at p.117.



whether these words, as used in the section, refer to a widow or husband or issue of a marriage under the Marriage Act<sup>1</sup>, it is submitted that the qualifying words "such marriage" have the effect of restricting widow, husband and issue to those of a marriage contracted under the Act. Therefore, if X marries Y in accordance with the provisions of the Marriage Act; and, on the determination of this marriage, enters into a customary union with Z, Z will not qualify as a widow under the section in the event of X's intestacy; unless, as we shall see, X is also survived by an issue of his first marriage.

#### CHILDREN

Once the provisions of the section apply, the courts, after some reluctance, have, by the process of judicial manipulation, interpreted the English Statutes of Distribution in a manner, whereby the intestate's legitimate and legitimated children under the customary law have been allowed to share in the estate along with the issue of a marriage under the Marriage Act.

The case of Re Somefun represented an earlier

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1 Coker, Family property among the Yorubas (1958) p.281.

era when judicial opinion on the question of legitimacy was rather rigid. In that case, the deceased intestate was an issue of a marriage contracted under the Marriage Act. He was survived by a woman he married under customary law, a child born to him by this woman, and a brother who was also an issue of the marriage under the Act. Despite the brilliant argument of the Administrator-General to the effect that the words wife and children in the Statute of Distribution included the deceased's widow and child, the West African Court of Appeal held that only the surviving brother was entitled to inherit the estate left by the deceased.

But this rather unsatisfactory decision was not to stand. For, in the case of Re Adadevoh and ors.<sup>1</sup>, decided ten years later by the West African Court of Appeal, Re Somefun<sup>2</sup> was expressly overruled. In the later case<sup>1</sup>, the deceased, who was himself an issue of a marriage under the Marriage Act, contracted a marriage in accordance with the provisions of the Marriage Act. His marriage terminated by the death of his wife. But, both before the marriage and after its determination, he entered into a number of customary unions, as a result

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1 (1951) 13 W.A.C.A. 304.

2 (1941) 7 W.A.C.A.156.

of which the respondents were born. On his death intestate, they claimed a share of the estate. The Court below, apparently considering them to be illegitimate under English law, held that they were not entitled to succeed unless it could be shown that, in the absence of next-of-kin, the estate would escheat to the Crown. The West African Court of Appeal, allowing the appeal, remitted the case back to the Court below, with directions to ascertain the customary law relating to the legitimacy of the appellants with respect to their rights of succession on the intestacy of their father, the deceased. Verity, C.J., as he then was, delivering the judgement of the Court, said:

"If, as it was assumed throughout the proceedings, the deceased was a person subject to native law and custom..., then the law to be applied in ascertaining the legitimacy of the children is the native law and custom applicable to him, subject, of course, to such modification and qualifications as may be imposed by statute." (1)

In Bamgbose v. Daniel<sup>2</sup>, the question of the legitimacy of the children of customary marriages under the Statute of Distribution once again came before the West

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1 (1951) 13 W.A.C.A. at p.309.

2 (1954) 14 W.A.C.A. 111.

African Court of Appeal<sup>1</sup>, and ultimately went to the Privy Council<sup>2</sup>. There, the deceased, the issue of a marriage under the Marriage Act, had entered into nine customary unions. The respondents (other than the Administrator-General) were the children of these customary unions, and they claimed as the legitimate children of the deceased under Nigerian law. The appellant was the only son of the deceased's brother, and was legitimated under the Legitimacy Act<sup>3</sup> by the marriage of his parents under the 1884 Marriage Ordinance. He claimed to be solely entitled, and to exclude the respondents on the ground that they were illegitimate under the English Statute of Distribution. It was held that the respondents were entitled to inherit the deceased's estate under the Statute of Distribution in preference to the appellant. The case is authority for the proposition that, while English rules governing distribution determine the order in which persons take (for example, children before brothers and sisters, etc.), the meaning to be attached to the word "children" in the Statute of Distribution must be ascertained in accordance with

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1 (1954) 14 W.A.C.A.111.

2 (1954) 14 W.A.C.A.116; [1954] 3 All E.R.263; [1955] A.C.107.

3 Cap.103, Laws of the Federation of Nigeria and Lagos,1958.

Nigerian law, which includes customary law; and that any person legitimate by that law is entitled to inherit under the English rules relating to distribution<sup>1</sup>.

The word "children" in the Statute of Distribution has also been interpreted to include acknowledged children - children born out of wedlock, but whose paternity has, nevertheless, been acknowledged by their natural father - provided that such acknowledgement of paternity does not offend the repugnancy principle, and is not contrary to public policy. This, in effect, means that in determining the status of the acknowledged child under customary law, the marriage (customary) of his parents is not a relevant subject for investigation. In Alake and ors. v. Pratt and ors<sup>2</sup>, the deceased had married under the Marriage Act, and had two groups of children; the respondents who were the issue of the marriage under the Act and the appellants, who were born out of wedlock, but whose paternity he had nevertheless acknowledged. The court of first instance held that the appellants were not entitled to

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1 (1954) 14 W.A.C.A. at p.121; [1954] 3 All E.R. at p.267; [1955] A.C. at p.119.  
2 (1955) 15 W.A.C.A.20.

a share of the estate on the ground that it was contrary to public policy to place children born out of wedlock on the same footing as the children born in wedlock.

This decision was reversed by the West African Court of Appeal. It held that the status of legitimacy was to be determined by the law of Nigeria which includes customary law (the law of the domicile of the appellants); and, since the effect of the deceased's acknowledgement of the appellants' paternity was to make them legitimate under customary law (Yoruba customary law), they were entitled to succeed to his estate, along with his other legitimate children<sup>1</sup>.

The report of the case (Alake's)<sup>2</sup> does not make it clear whether the children, whose paternity was acknowledged, were born during the subsistence of their father's marriage under the Marriage Act, or whether they were born before such marriage or after it had been determined. For some time after Alake's<sup>2</sup> decision, there existed no authority on the status of an acknowledged child born to

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1 The principle established or, better still, recognised in this case has since, of course, been followed by the High Courts. See: Jirigho v. Anamali [1958] W.N.L.R. 195 (High Court of the old Western Region); Taylor and ors v. Taylor [1960] L.L.R. 286 (High Court of Lagos).

2 (1955) 15 W.A.C.A. 20.

a man, during the continuance of his marriage under the Marriage Act, by a woman other than his wife. In 1960, the Supreme Court had the opportunity to pronounce authoritatively on the matter. In Cole v. Akinyele and ors.<sup>1</sup>, the deceased had married under the Marriage Act, the first respondent being a child of this marriage. After the death of his wife, he married the second respondent, also under the Marriage Act. He also had two sons born to him as a result of an irregular association with another woman. These two children were the appellants. The first appellant was born out of wedlock during the subsistence of the deceased's first marriage; while the second appellant, although conceived out of wedlock during the subsistence of the first marriage, was born some six weeks after the death of the deceased's first wife, but before his second marriage. The deceased acknowledged the paternity of both appellants during his lifetime. They claimed that they were entitled to share in their father's estate since he had acknowledged their paternity, an act which under Yoruba customary law made them legitimate. They gave no evidence of the Yoruba

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1 (1960) V.F.S.C.84.

customary law of acknowledgement of paternity, but instead relied on Alake's case<sup>1</sup> and section 14(2) of the Evidence Act.<sup>2</sup> The trial Judge dismissed their claim, distinguishing Alake's case<sup>1</sup> on the ground that, in that case, the deceased's wife had died at the time of birth of the acknowledged children; while in the instant case, the first appellant was born when a valid legal marriage subsisted, and the second appellant was conceived during the subsistence of the deceased marriage, and so was "already in being" during the period of the subsistence of the marriage.

On appeal, the Supreme Court affirmed the decision of the lower Court given with respect to the first appellant's claim. The Court held that the first appellant was born out of wedlock during the continuance of a marriage under the Marriage Act, and was, therefore, illegitimate, notwithstanding his natural father's acknowledgement of paternity. The Court was of the view that to apply the rule of Yoruba customary law relating to acknowledgement of paternity would be contrary to public policy; and that the first appellant could only

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1 (1955) 15 W.A.C.A. 20.

2 Cap.62, Laws of the Federation of Nigeria and Lagos, 1958.



be legitimated, if at all, under the general law, that is, the Legitimacy Act<sup>1</sup>. Brett, F.J., who delivered the judgement of the Court, said:

"I am not prepared to treat Alake v. Pratt as authority for the proposition that while a man is married under the Marriage Ordinance he can make a child born to him during the continuance of that marriage by a woman other than his wife, legitimate by the mere acknowledgement of paternity and I should regard such a rule as contrary to public policy."(2)

As regards the claim of the second appellant, however, the Court held that the appeal must succeed on the ground that he was legitimate, being born at a time when the father's marriage under the Marriage Act had been determined as a result of the death of the wife. At that time the deceased was free to marry according to customary law, and the general law relating to marriage was no longer applicable to him. And since under the relevant provisions of the general law, the time for determining legitimacy is the time of the child's birth, and not the time of its conception, public policy was not contravened by recognising the Yoruba customary law rule of acknowledgement of paternity. The Court further held that

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1 Cap.103, s.3(1), Ibid.

2 (1960) V F.S.C. at p.87. The public policy which was being protected seemed to be the policy against promiscuity and extra-marital relations.

there was nothing in Alake's case to warrant the observation made by the trial Judge to the effect that the acknowledged children in that case were born after the death of the wife married by their father under the Marriage Act.

In 1961, the Supreme Court laid down the categories of legitimate children in Nigeria. This was in the case of Lawal and ors. v. Ekun and ors. v. Younan and ors.<sup>1</sup>, an action brought under the English Fatal Accidents Acts<sup>2</sup> on behalf of the customary widows and children of two deceased persons, who were married in accordance with the provisions of customary law. Referring to the concept of legitimacy in Nigeria and comparing it with that under English law, Ademola, C.J.F., observed:

"Unlike in England, legitimate children in Nigeria are not confined to children born in wedlock or children legitimated by subsequent marriage of the parents. In Nigeria, a child is legitimate if born in wedlock according to the Marriage Ordinance. There are also legitimate children born in marriage under Native Law and Custom. Children not born in wedlock (Marriage Ordinance) or who are not the issues of a marriage under Native Law and Custom, but are issues born without marriage can also be

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1 [1961] All N.L.R. 245; [1961] W.N.L.R.197.

2 (1846) 9 & 10 Vict., c.93; and (1864) 27 & 28 Vict., c.95.

regarded as legitimate for certain purposes<sup>1</sup>, if paternity has been acknowledged by the putative father - see Bamgbose v. Daniel 14 W.A.C.A. 111 and 115 and Alake v. Pratt 15 W.A.C.A. 20. On the face of this, it is clear that legitimacy in England is a different concept to legitimacy in Nigeria". (2)

### Widow

It will become apparent in later chapters dealing with the customary scheme of distribution that a surviving wife is not entitled to inherit any property from her deceased husband under customary law. The position is, however, different when section 36 of the Marriage Act applies; for example, when a man married under the Marriage Act is survived by the issue of such marriage, and a wife he had married under customary law after the determination of his marriage under the Marriage Act. The point here considered may be stated thus: suppose X marries Y in accordance with the provisions of the Marriage Act, and there is an issue of such marriage; and

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- 1 The "certain purposes" are not specified. There is no doubt that succession would be one of these purposes. See: Coker, Family property among the Yoruba, p.266. The author is, however, of the view that the legal effect of acknowledgement of paternity is not to make the acknowledged child legitimate, but merely to entitle him to inherit his father's property. It is submitted that this view makes a distinction without a difference; and that the better view is that the acknowledged child becomes legitimate (or, at least, legitimated). See Lawal's case [1959] W.N.L.R. 155 at p.163 (High Court of Western Region); and the authorities already examined in this section.
  - 2 [1961] All N.L.R. at p.250; 1961 W.N.L.R. at p.202.

on determination of such marriage, he marries Z under customary law. What is Z's legal position with respect to the succession to X's estate, if X dies intestate, leaving Z and the issue of the marriage under the Act surviving him? It will be recalled that, in these circumstances, the provisions of section 36 of the Marriage Act and, with them, those of the English Statute of Distribution govern X's succession, since there is an issue of the marriage under the Marriage Act surviving him. It will also be recalled that in Re Somefun<sup>1</sup>, where the customary widow was the wife of an issue of a marriage under the Marriage Act, the West African Court of Appeal rejected the Administrator-General's argument that the word "wife" under the Statute of Distribution should include the widow under customary law.

In Re Adadevoh and ors.<sup>2</sup> however, the West African Court of Appeal overruled its own decision in Re Somefun<sup>1</sup> and, even though no claim was made by the widow or widows of the customary marriages, the Court indicated that the "widow" or "widows" could succeed if they claimed and established proof of marriage<sup>3</sup>. It will be remembered

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1 (1941) 7 W.A.C.A. 156.

2 (1951) 13 W.A.C.A. 304.

3 Ibid. at p.311.

that the deceased in Re Adadevoh and ors.<sup>1</sup> was an issue of a marriage under the Marriage Act, and had himself contracted a marriage under that Act. This marriage was determined by the death of the wife, and there were no issue of the marriage. Both before this marriage and after it had been determined, the deceased had entered into several customary marriages, the wives of which the Court was prepared to accord the status of "widows" under the Statute of Distribution.

The Ghana case of Coleman v. Shang<sup>2</sup> has fully recognised the claim of a "widow" under customary law under the provisions of the Statute of Distribution. In that case, the deceased first married under customary law. There were three children of this marriage. After the death of his customary wife, he contracted a marriage under the Ghana Marriage Ordinance, the appellant being the only surviving issue of the marriage. When the second (Ordinance) wife died, he married the respondent under customary law. He died intestate leaving an issue

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1 (1951) 13 W.A.C.A.304.

2 [1959] G.L.R.390 (Ghana Court of Appeal); [1961] 2 All E.R. 406; [1961] A.C. 481 - Privy Council. Discussed in [1960] J.A.L.160.

of the Ordinance marriage, children of a customary marriage and a widow of the customary union. Section 48 of the Ghana Marriage Ordinance (similar to section 36 of the Nigerian Marriage Act except that it applies to two-thirds of the estate), therefore, applied by virtue of which two-thirds of the estate fell to be distributed in accordance with the provisions of the Statute of Distribution. The Privy Council, affirming the decision of the Ghana Court of Appeal, held that the widow under customary law took under the Statute of Distribution. The ground for the decision was that the status of a wife or widow was to be determined by the law of Ghana (the law of the domicile) which ascribed that status to all persons regarded as lawful wives or widows whether they be married under the Marriage Ordinance or in accordance with customary law. Lord Tucker, advertng to the difficulties that might arise in the case of a man survived by more than one customary widow, said:

"Difficulties may, no doubt, arise in the application of this decision in cases where there are more than one widow both in dealing with applications for the grant of letters of administration and in the distribution of the estate, but they can be dealt with as and when they arise." (1)

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1 [1961] 2 All E.R. at p.412; [1961] A.C. at p.495.

It is doubtful whether it was ever the intention of the legislature to benefit the widow of a customary marriage in this way. It cannot, however, be doubted that this decision constitutes one of the valiant attempts at judicial manipulation. It is to be hoped that a surviving husband in similar circumstances would be treated in the same way, since what is sauce for the goose is sauce for the gander.

Property to which the section applies

Paragraph (b) of subsection (1) mentions, and excludes from the operation of the provisions of section 36, "real property the succession to which cannot by native law and custom be affected by testamentary disposition". The most obvious example of such property is unpartitioned land, belonging to the family, which devolves according to customary law. Thus, in Caulcrick v. Harding and another,<sup>1</sup> real property was left by a man to his three daughters, one of whom was married to the plaintiff in accordance with the provisions of the Marriage Act. This daughter, so married to the plaintiff, died intestate survived by him. He claimed one-third share of the property

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<sup>1</sup> (1926) 7 N.L.R. 48.

in virtue of his deceased's wife's right. Tew, J., held that the plaintiff was not entitled to such a share of the property since it was family property, and under customary law no one of those entitled had any right or interest of which she could dispose without the consent of the others. The three daughters were not tenants in common as under English law.

In Sogunro Davies v. Sogunro Davies and ors.<sup>1</sup>, the plaintiff was the illegitimate son of one Alfred Sogunro Davies. The latter had died entitled to a share of his deceased father's estate of which there had been no partition up to the date of his death (Alfred Sogunro Davies'). Alfred Sogunro Davies had married under the Marriage Act. The plaintiff claimed an account and payment to him of the share of his grandfather's estate to which he was entitled under customary law. The defendants, the receivers of the grandfather's estate, pleaded that by virtue of section 36(a) of the Marriage Act all the property of Alfred Sogunro Davies (including the share of the grandfather's property) must on his death intestate be distributed according to English law.

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1 (1936) 13 N.L.R.15.



Graham Paul, J., held that Alfred Sogunro Davies, at the date of his death, had no right to dispose by will of his share in his father's (the plaintiff's grandfather's) estate, since customary law, not English law, governed the plaintiff's right to share in the property of his late grandfather.

It should be observed that the provisions of the section apply to all personal property left by the deceased intestate. It was not perhaps brought to the notice of the legislators that personal property (movables) might also become family property of which the holder for the time being could not dispose outright, whether by will, gift or otherwise. Examples of such personal property, which might be collectively owned by the members of the family, include articles of furniture or personal adornment possessing special or unique value, such as a specially wrought head-gear or beads. It is submitted that family personal property of this type falls outside the ambit of the provisions of the section. This is because the criterion for the exclusion of real property belonging to the family is the disability imposed by customary law on the testamentary powers of the intestate -

a disability which clearly exists in respect of personal or movable property jointly owned by the members of the deceased intestate's family.

Scheme of distribution under the rules of English law relating to the devolution of personal estates on intestacy as they stood on the 1st day of January, 1900<sup>1</sup>

(a) The Statutes of Distribution<sup>2</sup> - The personal estate of a man

If a man died intestate before the 1st September, 1890, leaving a widow and issue surviving him, the widow was entitled to one-third of the estate; and the remaining two-thirds of the estate was distributed equally among the issue and such persons as legally represented any issue in any case where the issue died before the intestate - that is to say, there was the principle of representation<sup>3</sup>. The descendants of an issue who pre-

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- 1 For a fuller account of these rules see: Halsbury's Laws of England, 1st edn., (1910), vol.11, pp.16-31; Parry, D.H., The law of succession, 4th edn. (1961), pp.145-8; 22 E.R. (Ch.), cap. XXXIX, pp.367-382.
  - 2 (1670), 22 & 23 Car.2, c.10; and (1685), 1 Jac.2, c.17.
  - 3 Statute of Distribution (1670) (22 & 23 Car.2, c.10) s.3.

deceased the intestate took per stirpes the share which he or she would have taken had he or she survived the intestate. If he left a widow but no issue, the widow was entitled to one moiety of the estate<sup>1</sup>.

If there were no issue or their representatives (descendants), then subject to the rights of the widow, if any, the father took the whole of the estate<sup>2</sup>; and if the father also predeceased the intestate, then, subject to the rights of the widow, if any, the mother, brothers and sisters shared equally, the children (not grandchildren) of a deceased brother or sister taking their parents' share<sup>3</sup>.

If he left neither descendants nor parents but only grandparents, brothers and sisters, the grandparents were postponed to the brothers and sisters of the intestate<sup>4</sup>.

In default of descendants, a father, brothers or sisters or children (not grandchildren) of brothers or sisters, a surviving mother of the intestate took subject to the rights of the widow, if any, as explained above<sup>3</sup>.

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1 Statute of Distribution (1670) (22 & 23 Car.2, c.10) s.3.

2 Blackborough v. Davis (1701) 1 P. Wms.41 at p.48.

3 Statute of Distribution (1685) (1 Jac.2, c.17), s.7.

4 Stephen's Commentaries on the laws of England, 17th edn. (1922), vol.II, p.605, and the authorities cited therein.

If there were no parents but the next-of-kin (other than the widow) were brothers or sisters of the intestate and children of deceased brothers or sisters, they shared per stirpes<sup>1</sup>. But this mode of distribution was limited to cases where there was at least one brother or sister surviving; if all the next-of-kin were children of deceased brothers or sisters of the intestate, the distribution among them was per capita, since they took not by way of representation but as next-of-kin.<sup>2</sup>

In all other cases, and, subject to the claims of the widow, if any, the estate went to the intestate's kindred in the nearest degree (next-of-kin) in equal shares. The next-of-kin were ascertained in accordance with the civil law rule, quot personae tot gradus, that is, by computing up from the intestate to the common ancestor and then down again to the claimant.<sup>3</sup>

If there were no next-of-kin but there was an executor in existence, the latter took, subject to the rights of the widow, if any, unless he was by implication excluded by an express gift to him in the will.<sup>4</sup>

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1 Statute of Distribution (1670) (22 & 23 Car.2 c.10) ss.6 and 7.

2 Lloyd v. Tench, 2 Ves.Sen.212.

3 Halsbury's Laws of England, 3rd edn. (1956), vol.16 p.419.

4 Re Bacon's Will (1886) 31 Ch.D.460.

If there were no next-of-kin or executor, then subject to the widow's rights, if any, the Crown took the estate as bona vacantia<sup>1</sup>.

(b) Statute of Frauds<sup>2</sup> - Woman's personal estate

A widower was entitled to all the personal estate (including leaseholds) of his deceased wife, in so far as it had not been disposed of by her will<sup>3</sup>. If, however, she had been judicially separated from him before her death, all property acquired by her subsequent to the date of the decree of judicial separation devolved at her death, in the same way as it would have devolved if her husband had been dead.<sup>4</sup>

The personal estate of an unmarried woman was distributed in accordance with the rules already stated with respect to the estate of a man, save that there was, of course, no question as to the rights of a widow or husband.

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1 Re Barnett's Trusts [1902] 1 Ch.847.

2 (1677) 29 Car.2, c.3.

3 Ibid, s.24.

4 Matrimonial Causes Act (1857) (20 and 21 Vict., c.85), s.25; see now Matrimonial Causes Act (1950) (14 Geo.6, c.25), s.21.

(c) Intestates Estates Act<sup>1</sup> - Real and personal estate

The Intestates Estates Act governed the distribution of both real and personal estates in cases of total intestacies occurring after the 1st September, 1890. The Act was a modification of the Statutes of Distribution with respect to the claims of the widow of a man dying totally intestate. It provided that where a man died totally intestate after the 1st day of September 1890, leaving a widow but no issue, the whole of his estate, if not exceeding £500 in net value, belonged to his widow absolutely<sup>2</sup>. If, however, such estate exceeded £500 in net value, the widow had a claim to the first £500, payable rateably out of the real and personal estate according to their respective values; without prejudice to her other claims in respect of the residue of her husband's estate.<sup>3</sup>

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1 (1890) 53 & 54 Vict. c.29.

2 Ibid, s.1.

3 Ibid, ss.2 and 4.

CHAPTER FOURTHE EFFECT OF A CHRISTIAN OR MONOGAMOUS MARRIAGE ONINTESTATE SUCCESSION (CONTINUED)SUCCESSION NOT GOVERNED BY THE PROVISIONS OF THE MARRIAGE ACT

In respect of the situations listed below, the provisions of section 36 of the Marriage Act are inapplicable to the succession of the intestate notwithstanding his Christian or monogamous marriage; and the fact that he has left a widow or issue of such marriage surviving him.

These situations include:

- (a) where an intestate, who is subject to customary law, contracts a marriage under the Marriage Act, but leaves immovable property situated outside Lagos;
- (b) where an intestate, subject to customary law, marries under the Marriage Act, leaves movable property in Lagos, but dies domiciled elsewhere, say, in one of the Regions;
- (c) where an intestate, subject to customary law, enters into a Christian or monogamous marriage not in accordance with the provisions of the Marriage Act; and

(d) where a person, who is not subject to customary law - an Englishman, for instance - contracts a Christian or monogamous marriage, whether under the provisions of the Marriage Act or some other law.

(a) Where the immovable property is situated outside Lagos; and

(b) where the movable property of the intestate is situated in Lagos, but he died domiciled elsewhere.

Both situations have already been discussed in the preceeding chapter, where it was stated that, under the rules of private international law, the provisions of the section were clearly inapplicable. In these situations, the applicable law is the law of the Region in which the immovable property is situated - lex situs - or of the Region in which the intestate was domiciled at the time of his death - lex domicilii. As will appear shortly, the applicable law differs according to the area concerned, whether it is the Eastern Region, on the one hand, or the Western and the Mid-Western Regions on the other. The position in the Eastern Region will be considered first.



THE EASTERN REGION(i) Real (immovable?) property

As will have been noticed, a question mark has been inserted immediately after the word immovable appearing in brackets. This is designed to indicate that the old English rules of descent which, as will be seen later, are still applicable in the Eastern Region dealt with the devolution of only the real or freehold estate of the deceased intestate; and that that part of his immovable property consisting of leasehold estate was distributed in accordance with the provisions of the Statutes of Distribution discussed in the preceeding chapter. In the discussion which follows, only the former rules (those governing the descent of real estate) are treated; those relating to the distribution of personal estates being postponed to a later section of this chapter.

Basis of application of English law

The statutory provisions by which English law has been introduced into the Eastern Region are contained in both the High Court Law<sup>1</sup> and the Magistrates' Courts Law<sup>2</sup> of the Region. These provisions, which are sub-

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1 No.27 of 1955, s.14.

2 No.10 of 1955, s.40.

stantially similar to those embodied in the Law (Miscellaneous Provisions) Act<sup>1</sup> already quoted in chapter three, fix the date for the application of English law, in respect of any matter within the legislative competence of the Region, at the 1st day of January, 1900.

It must be observed that these statutory provisions state that the English law applicable should be the common law of England, the doctrines of equity, together with the statutes of general application. The last source of the applicable English law is difficult to define, and it has been said that "each case has to be decided on the merits of the particular statute sought to be enforced.." <sup>2</sup> Nevertheless, both on the basis of the "rough but not infallible test" - geographical generality throughout England, and generality of application to all classes of the community<sup>2</sup> - and on actual judicial authority<sup>3</sup>, it

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1 Laws of the Federation of Nigeria and Lagos, cap.89, s.45.

2 Att. - Gen. v. John Holt and Co.Ltd. (1910)2 N.L.R.1 at p.21, per Osborne, C.J. Also, the recent case of Lawal and ors. v. Younan and ors. 1961 All N.L.R.245 at p.256; [1961] W.N.L.R. 197 at pp. 204-5; where Brett, F.J., delivering one of the judgements of the Supreme Court of Nigeria, approved of Osborne, C.J.'s view.

3 Cole v. Cole (1898) I.N.L.R.15 at p.23.

may be stated that the applicable English law relating to descent of real estate is to be found in the rules of the common law; the Inheritance Act<sup>1</sup>; the Dower Act<sup>2</sup>; and Lord St Leonard's Act<sup>3</sup>.

The old English Rules of Inheritance or Canons of Descent

Where the provisions of section 36 of the Marriage Act apply, the intestate's real property is treated as personal property for the purposes of distribution<sup>4</sup>.

Where the old English rules of inheritance apply, however, the real property descends in accordance with the canons of descent; with the result that, as will be apparent later, the eldest son takes all the real estate by the rule of primogeniture. There are a number of other differences between inheritance under the old English rules and succession under the provisions of section 36 of the Marriage Act. These will be seen when we discuss the scheme of inheritance with respect to the rights of the following: (a) spouses;

(b) children;

(c) other heirs; and

(d) the Crown.

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1 {1833} 3 & 4 Will.4, c.106.

2 {1833} 3 & 4 Will.4, c.105.

3 {1859} 22 & 23 Vict., c.35.

4 The Marriage Act, cap.115, s.36(1), Laws of the Federation of Nigeria and Lagos.

The statement of the rules is in the past tense.

(a) Spouses

Husband

A husband enjoyed a life interest in respect of the freehold estate in his wife's possession at her death, provided that a child of the marriage had been born alive<sup>1</sup>. This right of the husband was known as curtesy.<sup>1</sup>

Wife

At common law, she was entitled to a life interest in one-third of all freehold land acquired by purchase (not by descent, partition, etc.) by her husband during coverture, provided that such land was not disposed of by her husband, either inter vivos or by his will<sup>2</sup>. In addition, she was entitled under the provisions of the Dower Act to a life interest in equitable interests to which her husband was beneficially entitled at his death<sup>2</sup>.

(b) Children

The eldest male child took all the deceased father's real property by the rule of primogeniture<sup>3</sup>. In default of male children, female children inherited together in

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1 See: Halsbury's Laws of England, 3rd edn., vol.32, pp.299-302; Parry, The law of succession, 4th edn. p.144; also the authorities cited therein.

2 See: Halsbury's Laws of England, 3rd edn., vol.32, pp.302-5; Parry, loc.cit; and the authorities cited by the authors.

3 Halsbury's Laws of England, 3rd edn., vol.16, p.425; Parry, op.cit., p.142.

equal shares or as coparceners<sup>1</sup>. There was the principle of representation of lineal descendants (children, grandchildren, etc.) in infinitum; so that if A died having an eldest son, B, who predeceased him (A), but having a son, D, and a younger son, C, who survived him (A); A's grandson inherited all his freehold lands to the exclusion of C and all others<sup>1</sup>.

(c) Rights of other heirs

On failure of lineal descendants or issue of the intestate, the nearest lineal ancestor inherited<sup>2</sup>. Thus a father was heir to his intestate son in preference to the brother of the intestate<sup>3</sup>. The father also inherited before the mother of the intestate. As a rule, the scheme of inheritance was such that the paternal ancestor was preferred to the maternal one. Accordingly no male maternal ancestor nor any of his descendants inherited until all the paternal ancestors and their descendants had failed; nor any female paternal ancestor and her descendants until all the male paternal ancestors and their descendants had failed; nor any female maternal ancestor nor any of her descendants, until all the male maternal ancestors

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1 Halsbury's Laws of England, 3rd edn., vol.16, p.425; Parry, op.cit.p.142.

2 The Inheritance Act (1833) (3 & 4 Will.,c.106), s.6.

3 Ibid., ss.7 and 8.

and their descendants had failed<sup>1</sup>.

Failing ancestors, collaterals (brothers, sisters, uncles, nephews, etc.) of the full blood inherited<sup>2</sup>.

In default of collaterals of the full blood, those of the half-blood inherited<sup>2</sup>. The significance about the inheritance rights of collaterals was that female collaterals of the full blood were preferred to those of the half-blood. Thus, a sister of the whole blood inherited before a brother of the half-blood. But the mode of inheritance was different according as the collaterals were males or females. For, while only the eldest male inherited where there were two or more males in equal degree, females in equal degree all inherited together as coparceners.

(d) The rights of the Crown

On the death intestate of a tenant in fee simple and without heirs, the Crown was entitled by escheat to any freehold land vested in him for an estate in fee simple<sup>3</sup>. This right of the Crown existed under the common law.

The Inheritance Act was concerned with the tracing of descent and inheritance from the purchaser, who was defined as the person "who last acquired the freehold land

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1 Ibid., ss.7 and 8.

2 Ibid., s.9.

3 Parry, op.cit., pp.144-5. In Eastern Nigeria, this will now go to the State of Nigeria.

otherwise than by descent"<sup>1</sup>. But descent over the ages was often difficult to trace, and a freehold estate might escheat to the Crown through failure on the part of a claimant to establish that the propositus acquired the land by purchase and not by descent. The hardship following from such a case was minimised by Lord St. Leonard's Act<sup>2</sup>, by virtue of which descent was to be traced from the person last entitled, as if he had been the purchaser<sup>2</sup>.

(ii) Movable(personal?) property

In keeping with our desire to stress the difference between the rules of conflict of laws, where the division of property is into movables and immovables, and those of the domestic law in the Eastern Region, where the distinction is between realty and personalty, we have this time put a question mark immediately after the word personal. We should add that where the deceased intestate's leasehold property is situated in the Region, succession to it will be determined in accordance with the rules relating to the distribution of personal estates to be examined in this section. Where, however, such leasehold

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1 The Inheritance Act, op.cit., s.2.

2 (1859) (22 & 23 Vict., c.35), s.19.

property is situated outside the Region, the applicable law will be the lex situs as has been pointed out in the preceeding chapter.

The intestate succession to the movable property of a person subject to customary law who marries under the Marriage Act, but dies domiciled in the Eastern Region, is governed by the law of the Region on the ground, as has been stated, that such law is the lex domicilii. On the basis of the Regional statutory provisions relating to the application of English law therein<sup>1</sup>, the Regional law of succession is to be found in four English enactments - the Statutes of Distribution, 1670<sup>2</sup> and 1685<sup>3</sup>; the Statute of Frauds<sup>4</sup>; and the Intestates Estates Act<sup>5</sup>. It will be recalled that these English Acts have already been dealt with in chapter three, where it has been observed that the Acts still apply in the Federal Territory of Lagos by virtue of the provisions of section 36 of the

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1 S.14 of the High Court Law, No.27 of 1955; s.40 of the Magistrates' Courts Law, No.10 of 1955; also, Re Emodie: Administrator-General v. Egbuna and ors. (1945) 18

N.L.R.1, at pp.2 - 3.

2 22 & 23 Car.2,c.10.

3 1 Jac.2,c.17.

4 (1677) 29 Car.2,c.3.

5 (1890), 53 & 54 Vict.,c.29.



Marriage Act. It now remains to consider some local decisions on any of these Acts.

Rights of the Crown (State) to bona vacantia

The most significant difference existing between succession to personal property where section 36 of the Marriage Act applies and that where the relevant English rules govern the distribution by virtue of the Eastern Regional statutory provisions introducing English law into the Region is in respect of the rights of the Crown to bona vacantia. For, whereas under the provisions of section 36 any property that would go to the Crown as bona vacantia is saved and distributed according to the rules of the customary law<sup>1</sup>; under the received English law, the Crown may still take as bona vacantia. This was the main point decided in the rather unsatisfactory case of Re Emodie: Administrator-General v. Egbuna and ors<sup>2</sup>.

In Re Emodie: Administrator-General v. Egbuna and ors<sup>2</sup>, the deceased, an Ibo, contracted a marriage at Port Harcourt in the Eastern Region in accordance with the provisions of the Marriage Act. He died intestate

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1 S.36(1)(a) of the Marriage Act, cap.115, op.cit.

2 (1945) 18 N.L.R.1. In view of the Republican status of Nigeria, rights of bona vacantia now belong to the State of Nigeria.

leaving personal property (not specified in the report) situated at Port Harcourt; and survived by the widow of the marriage. There were no children of the marriage. Also surviving the deceased intestate were his brother and sister, and illegitimate daughter, all three of whom were respondents in the suit. The Administrator-General applied to the then Supreme Court of Lagos for directions as to how the residue of the estate should be distributed. It was abundantly clear from the facts that the provisions of section 36 of the Marriage Act were inapplicable. The point for determination was whether English law (without the saving clause in the event of the estate belonging to the Crown as bona vacantia) applied; or whether the distribution was to be governed by the rules of the applicable customary law, in this case Ibo customary law.

Ames, J., held that the succession to the intestate's personal estate was governed by English law, not the customary law; and that the rights of the Crown to any portion of the estate remained unaffected. He observed, inter alia: " The fact that section 36 of the Marriage Ordinance applies only to Lagos appears to me to have the following consequence. It provides that any part which under English law would go to the Crown shall not do so but shall be distributed in accordance with the native law and custom. There is no such

provision applying to the Protectorate. It is not for me to make one. Consequently the rights of the Crown to any portion of this estate remain unaffected and are those which it has by the law of England". (1)

Before examining the grounds upon which this unsatisfactory decision has been based, it may be observed that even in those days when Nigeria had a unitary constitution (albeit a colonial one) and enjoyed a single legal system, the learned Judge took the view that there was a "Protectorate" domicile and, by inference, a "Colony" domicile. For, he said: "The deceased was ... domiciled in the Protectorate."<sup>2</sup> It is submitted, with respect, that this view of the learned Judge is untenable, having regard to the existence of one legal system operating throughout the country at the time. As has been observed, the concept of domicile is geared to a territory enjoying one legal system.

As regards the ground on which the learned Judge based his decision, we shall first take the well-known case of Cole v. Cole<sup>3</sup>, which he followed. As will be fully seen later, the principle enunciated in that case<sup>3</sup> is that "a Christian marriage clothes the parties to such marriage and their offspring with a status unknown to native law." (4)

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1 Ibid., at p.3.

2 At p.2.

3 (1898) 1 N.L.R.15.

4 Ibid., at p.22; per Brandford Griffith, J. Cf. Coker and ors. v. Coker and anor. (1943) 17 N.L.R.55, at p.57 where Brooke J., followed Cole v. Cole, op.cit.

Hence English law, not customary law, must govern the succession to intestates married in accordance with Christian rites. But the case of Smith v. Smith<sup>1</sup> stood in his way. In Smith v. Smith<sup>1</sup>, Van Der Meulen, J., observed that the mere fact that a person had contracted a Christian marriage was not conclusive evidence that English law, not customary law, should govern his succession; and that the intestate's way of life - including his education and general position in life - must be taken into account in the choice of law determining his succession. Ames, J., however, distinguished Smith's case<sup>1</sup> on three grounds, none of which, it is respectfully submitted, is tenable: that the facts of the case were exceptional; that it dealt with real property, while he was concerned with personal property in Emodie's case<sup>2</sup>; and that counsel for the next-of-kin had relied on section 36 of the Marriage Act and on section 20 of the Supreme Court Ordinance<sup>3</sup>, instead of basing their case on the circumstances of the deceased's life.

The answer to the first ground for the untenable distinction is that every case is decided on its own facts, whether these are described as exceptional or not. As

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1 (1924) 5 N.L.R. 105.

2 (1945) 18 N.L.R. 1.

3 See now the High Court of Lagos Act, cap.80, s.27; The High Court Law, Western Region, cap.44, s.12; The High Court Law, Eastern Region, No.27 of 1955, s.22.

regards the second ground, there is nothing in the report of Smith's case<sup>1</sup> to warrant the view that the decision would have been different had the property in dispute been personalty rather than realty. The third ground seemed to suggest that the Court might have decided differently had counsel for the next-of-kin adopted the line of argument suggested by the Judge. But the short answer is that the Supreme Court, being a Court of Justice, ought to have, of its own motion, taken the point and decided in favour of the next-of-kin. The decision is, to say the least, and with due respect, most unsatisfactory. It has the effect of applying a more rigorous general law of succession to the Provinces, where the customary law is more potent, than is the case of Lagos where foreign influences have tempered and are tempering the force of customary law<sup>2</sup>. Furthermore, it did not occur to the learned Judge that while persons marrying under the Marriage Act in Lagos are warned of the effect of the section on their succession, the deceased in Emodie's case was not so warned<sup>3</sup>.

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1 (1924) 5 N.L.R.105.

2 See Osborne, C.J.'s remarks in Lewis v. Bankole (1908) 1 N.L.R. 81 at p.101, to the effect that customary law outside Lagos was less affected by English influence.

3 S.36(2) of the Marriage Act.

That the decision in Emodie's case<sup>1</sup> is a doubtful authority may be seen in the recent case of Onwudinjoh v. Onwudinjoh<sup>2</sup>, where Ainley, C.J., as he then was, refused to follow Cole v. Cole<sup>3</sup> on which Ames, J., had based his decision in Emodie's case<sup>1</sup>. The facts in Onwudinjoh v. Onwudinjoh<sup>2</sup> are briefly as follows: the deceased had contracted a marriage under the Marriage Act in 1926 at Makurdi in the Northern Region. During the subsistence of the marriage, however, he purported to have contracted a customary union with another woman. He died in 1946 leaving the widow and six children of the marriage (the eldest among whom was the plaintiff); the other woman, he purported to have married under customary law, and four children born to him by this woman, the four defendants in this action. Shortly after the deceased's death, a document alleged to be his will was discovered, which left the bulk of his property to the defendants. The plaintiff sued seeking a declaration that the will was invalid, and that he was entitled to the father's estate on the resulting intestacy.

It was held (a) that the will was invalid on the

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1 (1945) 18 N.L.R.1.  
2 (1957) II E.N.L.R.1.  
3 (1898) 1 N.L.R.15.

ground that it did not comply with the provisions of the Wills Act relating to attestation; (b) that the defendants, being the offspring of an illicit union, had no interests whatever in their deceased father's intestate estate; and (c) that the proper persons entitled to apply for a grant of the letters of administration were the plaintiff and the deceased's widow of the marriage under the Marriage Act. As regards the principle in Cole v. Cole<sup>1</sup> to the effect that a Christian marriage "clothes the parties ... and their offspring with a status unknown to native law", the learned Chief Justice said:

"That resume of the decision errs on the side of simplicity ... and I would hesitate for very long before accepting all the conclusions which could logically be drawn from the case of Cole v. Cole. I do not decide this case upon the principles laid down in that case, for I think that that case itself and the whole line of cases decided by reference to it may one day be called in question by the Federal Supreme Court...."(2)

#### THE WESTERN AND MID-WESTERN REGIONS

In both the Western and Mid-Western Regions of

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1 (1898) 1 N.L.R.15.

2 (1957) 11 E.N.L.R. at pp.4 and 5. For other cases in which the decision in Cole v. Cole has been doubted, see: Smith v. Smith (1924) 5 N.L.R.105, and Bamgbose v. Daniel (1954) 14 W.A.C.A.116; [1954] 3 All E.R.263; [1955] A.C.107. The decision has not yet, however, been expressly (or impliedly) overruled.

Nigeria, the law governing the distribution of intestate estates of persons contracting Christian marriage is the Administration of Estates Law<sup>1</sup>. The Law is, in substance, a reproduction of two English statutes - the Administration of Estates Act<sup>2</sup> and the Intestates' Estates Act<sup>3</sup>.

The provisions of the Law are wider than those of section 36 of the Marriage Act: the Law governs the succession whether the Christian marriage is under the Marriage Act or not<sup>4</sup>; while section 36 is limited to succession where the Christian marriage is in accordance with the provisions of the Marriage Act. Under the provisions of the Law, however, there is a difference between the succession to the estate of an intestate (who is also subject to customary law) married under the Marriage Act and that of one contracting a Christian marriage not under the Marriage Act. In the latter case, the rights of the Crown (now State) to take as bona vacantia remain unaffected; in the former, the Crown (State) is expressly

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1 Cap.1, vol.1, Laws of the Western Region, 1959.

2 (1925) 15 Geo.5, c.23.

3 (1952) 15 & 16 Geo.6 & 1 Eliz.2, c.64.

4 The Administration of Estates Law, op.cit., s.49(1) and (5). Section 1(3) expressly excludes succession governed by customary law.



precluded from taking, and any rights that would have gone to it are distributed in accordance with the customary law to which the intestate was subject.<sup>1</sup>

The relevant provisions of the Law relating to the intestate succession of persons, who are subject to customary law, but who marry under the Marriage Act are similar to those contained in section 36 of the Marriage Act. They (the relevant provisions of the Law) read as follows:

"Where any person who is subject to customary law contracts a marriage in accordance with the provisions of the Marriage Ordinance and such person dies intestate after the commencement of this Law [i.e. the 23rd April, 1959] leaving a widow or husband or any issue of such marriage, any property of which the said intestate might have disposed by will shall be distributed in accordance with the provisions of this Law, any customary law to the contrary notwithstanding:

Provided that -

(a) where by virtue of paragraph (vi) of sub-section (1) of this section the residuary estate would belong to the Crown as bona vacantia such residuary estate shall be distributed in accordance with customary law and shall not belong to the Crown.

(b) any real property the succession to which cannot by customary law be affected by testamentary disposition shall descend in accordance with customary law anything herein to the contrary notwithstanding." (2)

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1 Ibid, s.49 (5)(a).

2 Ibid, s.49 (5).

Rules of distribution under the Administration of Estates Law.      No distinction between realty and personalty.

On the death intestate of a person married under a monogamous or Christian system of marriage, his realty and personalty are subjected to the same rules of distribution under the Administration of Estates Law. The position is similar to that under the English Administration of Estates Act<sup>1</sup>; and the intestacy creates "statutory trusts" for the benefit of the surviving spouse, the children and relatives of the intestate<sup>2</sup>.

Rights of the intestate's beneficiaries

The inheritance rights of the intestate's beneficiaries may be divided into four groups, namely:

- (i)        rights of the surviving spouse;
- (ii)       rights of the children;
- (iii)      rights of relatives, and
- (iv)       rights of the Crown (State), if any.

(i) Rights of the surviving spouse

If the intestate leaves a surviving spouse and issue, the surviving spouse takes the personal

1 Op.cit., s.47.

2 The Administration of Estates Law, op.cit., s.2.

chattels<sup>1</sup> absolutely, together with a sum equal to one-third of the residuary estate free of costs, charged on the residuary estate with interest at £2½ per cent per annum from the date of death until the date of payment. In addition, the surviving spouse takes a life interest in one-third of the residuary estate<sup>2</sup>.

If the intestate leaves no issue but a surviving spouse, a parent, a brother or sister of the whole blood or issue of a brother or sister of the whole blood, the surviving spouse takes on the lines indicated above, save that he or she is in this case entitled to a sum equal to two-thirds of the residuary estate; and, in addition, one-half of the residuary estate is held in trust for him or her<sup>3</sup>.

Where, however, the intestate leaves a surviving

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- 1 Loc.cit. The definition of personal chattels contained in s.2 of the Law comprises a long list of things, instruments and apparatuses. Briefly, however, it includes indoor and outdoor furniture and effects, also motor cars, jewelry, plate, books and consumable stores, but does not include chattels used for business purposes or money or securities for money. See Parry, The law of succession, 4th edn. (1961), p.151.
- 2 The Administration of Estates Law, op.cit., s.49(1)(i)(2).
- 3 Ibid, s.49(1)(i)(3).

spouse and there are no issue, no parent or brother or sister of the whole blood or issue of such brother or sister, the residuary estate is held in trust for the surviving spouse absolutely<sup>1</sup>.

(ii) The Rights of the children

If the deceased leaves a surviving spouse and children, then subject to the rights of the surviving spouse already stated, two-thirds of the residuary estate is held on the statutory trusts for the children who also take the reversion on the other one-third share of the residuary estate, which is held on the statutory trust for the surviving spouse<sup>2</sup>. If there is no surviving spouse, the whole of the residuary estate, including the personal chattels, is held on the statutory trusts for the children.<sup>3</sup> Distribution as between the issue is on the basis of equality<sup>4</sup>. There is the principle of representation.<sup>5</sup>

(iii) Rights of relatives

If the intestate leaves no issue, then subject to the rights of a surviving spouse, if any, the residuary estate goes to a surviving parent absolutely or to both parents equally as the case may be<sup>6</sup>.

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1 Ibid, s.49(1)(i)(1).

2 The Administration of Estates Law, op.cit., s.49(1)(i)(2).

3 Ibid, s.49(1)(ii).

4 Ibid, s.50(1)(i). By virtue of this section, beneficiaries in equal degree of relationship to the intestate take equally.

5 Loc.cit.

6 Ibid, s.49(1)(i)(3)(b)(i).

Failing issue and parents, brothers and sisters of the full blood take, subject, of course, to the rights of the surviving spouse, if any.<sup>1</sup>

In default of issue, husband or wife and parents, the order of preference is as follows:

- (a) brothers and sisters of the whole blood<sup>2</sup>;
- (b) brothers and sisters of the half-blood<sup>2</sup>;
- (c) grandparents<sup>2</sup>;
- (d) uncles and aunts (being brothers and sisters of the whole blood of a parent of the intestate)<sup>2</sup>; and
- (e) uncles and aunts (being brothers and sisters of the half-blood of a parent of the intestate)<sup>2</sup>.

(iv) Rights of the Crown (now State)

If the intestate dies without leaving a spouse, issue, parents, brothers or sisters, grandparents, uncles and aunts, who survive him, the residuary estate belongs to the Crown (State) as bona vacantia<sup>3</sup>; providing that, if he was subject to customary law and married under the Marriage Act, it would not belong to the Crown (State), but would devolve in accordance with customary law<sup>4</sup>.

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1 Ibid., s.49(1)(i)(3)(b)(ii).

2 Ibid., s.49(1)(v).

3 Ibid., s.49(1)(vi).

4 Ibid., s.49(5)(a).

- (c) Where a person subject to customary law contracts a Christian marriage not in accordance with the provisions of the Marriage Act.

A person subject to customary law who contracts a Christian marriage outside Nigeria celebrates the marriage in accordance with the provisions of the law of the place where such a marriage takes place.<sup>1</sup> This means that the succession to his intestate estate falls outside the provisions of the Marriage Act. But the law governing his intestate succession in Nigeria - if he dies intestate domiciled in any part of Nigeria, or dies intestate leaving immovable property situated therein - varies according as the area concerned is either the Federal Territory of Lagos and the Eastern Region or the Western and Mid-Western Regions. The most obvious example is the Nigerian student, who contracts a Christian marriage in this country, and who returns to one of the component units of Nigeria, where he dies (intestate) domiciled or where he leaves immovable property.

#### The Western and Mid-Western Regions

It will be recalled that the law governing the intestate succession of persons married in accordance

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1 Berthiaume v. Dastous [1930] A.C.79.

with Christian rites is the Administration of Estates Law, which, as we have seen, makes no distinction between the real and personal estate of the intestate. The only distinction it makes is between the succession of an intestate married under Christian marriage not in accordance with the Marriage Act, where the rights of the Crown(State) to bona vacantia remain unaffected; and that of an intestate married under the Marriage Act, where the rights of bona vacantia are ousted in favour of customary beneficiaries.

The Federal Territory of Lagos and the Eastern Region

The general rule is that English law as it stood on the 1st January, 1900, governs the succession of a person subject to customary law, who contracts a Christian marriage not under the Marriage Act, and who dies intestate, domiciled in the Federal Territory of Lagos or the Eastern Region; or who dies intestate - whether or not such a person is also domiciled in Lagos or Eastern Nigeria - leaving immovable property in these places. The English law at the material date has already been considered in an earlier part of this chapter. In some of the cases, however, the Courts have refused to apply the relevant rules of English law, and have, instead, applied the rules

of the applicable customary law. We shall now examine the attitude of the Courts to both the rules of the English law and those of the customary law.

Judicial application of the English rules of inheritance and those of customary law

English rules of inheritance

The locus classicus of the cases is the decision in *Cole v. Cole*<sup>1</sup>. There, the deceased, John William Cole (a native of Lagos) married the defendant, Mary Cole, in Sierra Leone in 1864 in accordance with the Christian rites. He returned to Lagos where he died intestate in 1897 domiciled in Nigeria. He was survived by a widow (the defendant), a brother and a lunatic son. The brother claimed in the lower court that he was the customary heir of the deceased and, as such, should succeed to the property as trustee for the lunatic son of the deceased. The widow, however, claimed that, since the deceased had contracted a Christian marriage, English law, not customary law, should govern the succession; and, therefore, the lunatic son was the lawful heir to the real estate left by the deceased. The Divisional Court (lower court) gave judgement for the brother. On appeal, the Full Court

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1 (1898) 1 N.L.R.15.



reversed the judgement of the Divisional Court, holding that it would be contrary to the principles of justice, equity and good conscience to allow customary law to govern the succession on the ground that the intestate's Christian marriage clearly showed that there was an intention to regulate his succession by English law. The Full Court based its decision on the wording of section 14 of the then Supreme Court Ordinance which provided that native law and custom should apply to natives especially in causes and matters relating to marriage, inheritance and land tenure, but which also further provided that

"no party shall be entitled to claim the benefit of any local law or custom, if it shall appear either from express contract or from the nature of the transactions out of which any suit or question may have arisen, that such party agreed that his obligations in connection with such transactions should be regulated by English law.(1)"

During the course of his judgement in the Full Court, Brandford Griffith, J., examined the differing incidents of Christian and customary marriages. He instanced the case of a doctor or barrister who married an educated

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1 See now: the High Court of Lagos Act, Laws of the Federation of Nigeria and Lagos, cap.80,s.27; the High Court Law, Western Nigeria, cap.12; the High Court Law, Eastern Nigeria, No.27 of 1955, s.22.

lady according to Christian rites, and argued against the "monstrous" result if customary law were applied to such a marriage and the wife required to marry the deceased doctor's or lawyer's brother. Explaining the position of a spouse of a Christian marriage and the offspring of such marriage, he said:

"Christian marriage imposes on the husband duties and obligations not recognised by native law....In fact, a Christian marriage clothes the parties to such marriage and their offspring with a status unknown to native law". (1)

It is submitted that the view that the nature of a Christian marriage implies an agreement to subject one's whole life to English law is untenable. What, for instance, is the sort of agreement that binds a person who first contracts a Christian marriage, and later, on the death of the other spouse, enters into a customary union? Is the intestate succession in such a case governed by both English law and customary law, at the same time? It is significant that, despite Brandford Griffith, J.'s, illustration regarding the mode of life of the doctor, barrister and the educated lady, the Court made no reference at all to the intentions, manner of life, or the education of John William Cole or his widow. The Court was solely concerned with the fact that the Coles

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1 (1898) 1 N.L.R. at p.22. Cf. Coker v. Coker (1943) 17 N.L.R.55 at p.57.

had contracted a Christian marriage. But the decision is supportable on quite another ground, for even customary law, on which the plaintiff (John William Cole's brother) based his claim, gave him, as we shall see, no legal right to succeed to the estate of his deceased brother so long as the latter's son was alive; the fact that such a son was a lunatic could only make the claimant a guardian, not a legal owner of the property.

In Adegbola v. Folaranmi & ors.<sup>1</sup>, the principle enunciated in Cole v. Cole<sup>2</sup> was not only followed, but inelegantly extended. In that case, the deceased, a native of Oyo in Yorubaland, had been married to the plaintiff's mother, under customary law. Subsequently, the deceased was captured as a slave, and taken to the West Indies, where during his stay of some forty years, he became a Christian and married another woman according to Christian rites. He returned to Nigeria and, in 1876, bought a piece of land, built a house and took up residence therein in Lagos. He died intestate in 1900, his wife by the Christian marriage continuing to live in the house and property. In 1918, this wife died leaving a will by which she devised the house and property to her

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1 (1921) 3 N.L.R.89.

2 (1898) 1 N.L.R.15.

executor, the defendant in the suit. The plaintiff - the only issue of the customary marriage - claimed to succeed under customary law to her father's property. The defendant, however, contended that English law applied by virtue of the deceased's Christian marriage and, therefore, the plaintiff was not entitled, as she claimed, since she was not an issue of the Christian marriage. Combe, C.J., held that English law applied and, most surprisingly, that the plaintiff was not entitled to succeed on the ground that she was not the issue of the Christian marriage. It should be observed that, although Combe, C.J., claimed to have followed Cole v. Cole<sup>1</sup>, Adegbola's case went further than the decision in Cole v. Cole<sup>1</sup>, for not only did it decide that English law should govern the order of succession to the deceased's estate, but also that it should govern the status of persons entitled to come within that order. The result of the mechanical application of English law by the Court was that the legitimate child of a valid customary marriage (i.e. the plaintiff) was bastardised for the purposes of inheritance with respect to her deceased father's estate. It will, however, have been observed that this unreasoning application of

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1 (1898) 1 N.L.R.15.

English law has been put right in Re Adadevoh and ors<sup>1</sup>, Bambose v. Daniel<sup>2</sup>, Alake v. Pratt<sup>3</sup> and Cole v. Akinyele<sup>4</sup>, which have held that, subject to the repugnancy principle and public policy, the status of legitimacy - and, hence the right to inherit from a deceased parent - is to be determined by the law of the claimant's domicile<sup>5</sup>.

In 1942, in the case of Gooding v. Martins<sup>6</sup>, the West African Court of Appeal, purporting to follow the principle laid down in Cole v. Cole<sup>7</sup>, extended the grounds upon which the decision in Cole v. Cole<sup>7</sup> was based. The deceased had first contracted a Christian marriage, during the subsistence of which the plaintiff was born. After the death of his first wife, he married again but under customary law, the defendants being the children of this marriage. On these facts, the Court held, in an extremely terse judgement, that only the plaintiff, the child of the Christian marriage, was entitled to inherit the deceased's

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- 1 (1951) 13 W.A.C.A.304.
  - 2 (1954) 14 W.A.C.A.116; [1954] 3 All E.R.263; [1955] A.C.107.
  - 3 (1955) 15 W.A.C.A.20.
  - 4 (1960) V.F.S.C.84.
  - 5 See chapter 3; also Lawal and ors: Ekun and ors. v. Younan and ors. [1961] All N.L.R.245; [1961] W.N.L.R.197, where the concept of legitimacy in England was compared and contrasted with the position in Nigeria.
  - 6 (1942) 8 W.A.C.A.108; cf. Re Somefun (1941) 7 W.A.C.A.156.
  - 7 (1898) i N.L.R.15.

estate. The defendants were excluded from inheriting their deceased father's estate on the ground that they were not, in effect, legitimate children for the purposes of succession. Happily enough, this decision, like that in Adegbola v. Foraranmi<sup>1</sup> no longer represents the law.

### Customary rules of inheritance

In some cases, the Courts have rejected the mechanical application of English law with respect to the intestate succession of persons contracting Christian marriage; and have applied the rules of customary law instead. They have done this by having due regard to the mode of life, the education and the circumstances of the intestate; or to the conduct of the parties claiming under English law.

The first of these cases was that of Asiata v. Goncallo<sup>2</sup>, decided just two years after the decision in Cole v. Cole<sup>3</sup>. There, the deceased, a Yoruba Moslem, had been sold into slavery and taken to Brazil, where he married a woman first according to Islamic rites, and then according to Christian rites. The second celebration was made in the belief that it alone would give State recognition to their first marriage which they regarded, for all other purposes, as the only genuine one. There were two

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1 (1921) 3 N.L.R.89.

2 (1900) 1 N.L.R.41.

3 (1898) 1 N.L.R.15.

daughters of this "Christian-Moslem" marriage. When the deceased returned to Nigeria, he married a second woman under Moslem law, the plaintiff being the only child of this marriage. Upon the death intestate of the deceased, it was held that all the children of the deceased were entitled to share in his estate according to the provisions of Moslem law. The Court refused to follow the decision in Cole v. Cole<sup>1</sup> on the ground that that case concerned intestacy, while in the instant case the question to be determined was the validity of the second (customary) marriage. Such a distinction, it is submitted, cannot be supported, since the question of whether English law or Moslem law should be applied to the succession to the deceased's estate depended entirely upon the validity, or otherwise, of the second marriage. The Court was, however, on firmer grounds when it based its decision on the circumstances of the deceased as a devout Moslem, and applied Islamic law, notwithstanding his Christian marriage. As Griffith, J., said:

"It is clear from the evidence that Alli [i.e. the deceased] was a bona fide follower of the prophet, and as such was legally entitled to marry many wives ..... But it may be fairly argued that assuming this marriage [i.e. the Christian marriage] to be legal, still it would be contrary to justice that Selia [i.e. the wife of the

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1 (1898) 1 N.L.R.15.

Christian marriage] having impliedly contracted by her Christian marriage for monogamy, her offspring should suffer by the breach of that contract by their father. But the contract which a Christian marriage would ordinarily imply was clearly not implied in the present case as Selia not only went through the Mohammedan ceremony of marriage first but she does not appear to have raised the slightest objection to her husband's subsequent marriages and wives..."<sup>1</sup>

Speed, Ag.C.J., was, however, of the view that the deceased had not contracted a valid Christian marriage. He said:

"I do not admit that the parties in this case contracted a Christian marriage at all. They were Mohammedans and they merely for local reasons went through the marriage ceremony in Christian form. Before and after the ceremony they lived and they died Mohammedans....." <sup>2</sup>

In Smith v. Smith<sup>3</sup> it was held that the position in life occupied by the parties and their conduct with reference to the property in dispute may lead the Court to apply the rules of customary law, rather than those of English law, to the succession of an intestate married in accordance with Christian rites. In that case, the deceased contracted a Christian marriage in Sierra Leone in 1876, before returning to Lagos where he died intestate, leaving a house. After his death intestate, all his children lived in the house as a sort of family property. The defendant - the deceased's eldest son - attempted, for the second time to raise money by the mortgage of the

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1 (1900) 1 N.L.R. at p.43.

2 Ibid., at p.44.

3 (1924) 5 N.L.R.105.



property, but was refused all co-operation by the plaintiffs, the other children of the deceased. He then claimed, for the first time, that he was absolutely entitled as heir at law in accordance with the rules of English law. The plaintiffs, basing their claim upon customary law, sued for the partition or sale of the property. It was held that, having regard to the circumstances of the deceased and the parties and their conduct with reference to the property, customary law applied; and the plaintiffs' claim must succeed. The decision in Cole v. Cole,<sup>1</sup> on which the defence had based its case, was distinguished on the ground that the circumstances of the instant case were entirely different. Van Der Meulen, J., observed:

"The fact that a man has contracted a marriage in accordance with the rites of the Christian Church may be very strong evidence of his desire and intention to have his life generally regulated by English laws and customs, but it is by no means conclusive evidence .... the question as to what law it is equitable to apply in any given case can only be decided after an examination of all the circumstances of the case...." 2

In the instant case, the fact that the parties continued to treat the property in dispute as common property (family property) after the death of the deceased tipped the scales in favour of the plaintiffs' claim.

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1 (1898) 1 N.L.R.15.

2 (1924) 5 N.L.R. at p.107.

The case of Ajayi v. White<sup>1</sup> in which customary law was applied to the succession of an intestate contracting a marriage under the Marriage Act seems to have been wrongly decided in so far as it was based on the decisions in Asiata v. Goncallo<sup>2</sup> and Smith v. Smith<sup>3</sup>; that is, the decisions based on the parties' general position in life. In Ajayi v. White<sup>1</sup>, the deceased, who had married under the provisions of the Marriage Act, died intestate, survived by several children. Her eldest son was the defendant in this suit, while the plaintiffs were her grandchildren and offspring of customary unions contracted by her children who had since died. After her death intestate, the parties treated her property in Lagos as family property from which they all received rents. The plaintiffs, basing their claim upon customary law and relying upon Smith v. Smith<sup>3</sup>, brought an action for partition of their grandmother's estate. The defendant resisted the claim, contending that he was absolutely entitled in accordance with the English rules of inheritance. The Court rejected the defendant's contention, and ordered the property to be sold. It held that the facts of the case - the parties'

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1 (1946) 18 N.L.R.41.

2 (1900) 1 N.L.R.41.

3 (1924) 5 N.L.R.105.

common enjoyment of the property and the intestate's lack of education - made it unjust to apply English law to her succession, and that customary law applied instead.

Baker, Ag.C.J., said:

"Whilst not unmindful that the fact that a woman has contracted a marriage in accordance with Christian rites is strong evidence that she desires that the succession to her property should be regulated by English law, in my opinion, however, it is not conclusive and is a presumption that depends on the circumstances in each and every case. This I am of the opinion is the meaning of section 17 of the Supreme Court Ordinance .....The original owner was no doubt the wife of an educated man but it is very doubtful whether she was literate or knew anything about the English law of succession; if she had done so, it is more than probable she would have made a will". 1

With the greatest respect, the reasons given for the decision are irrelevant. Here was a clear case of a person subject to customary law who had married under the Marriage Act, and had died intestate leaving an issue of such marriage and property situated in Lagos; and to whose succession section 36 of the Marriage Act automatically applied. The decision may, however, be justified on quite another ground: the parties' common enjoyment of the property as family property after the deceased's death made it inequitable for the defendant to rely on a statute (the English Inheritance Act) to defeat the plaintiffs' claim, since equity will not permit a statute to be used

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1 (1946) 18 N.L.R. at p.44.

as an instrument of fraud<sup>1</sup>.

The mere fact that a person, after going through a marriage by Christian rites, reverts to a pagan way of life, for example, by marrying a host of wives under customary law, is not sufficient evidence that he intends that customary law, not English law, should govern the succession to his estate on his intestacy. There must be some additional evidence of his intention to be gathered from the facts and circumstances of his case. Thus, in Haastrup v. Coker<sup>2</sup>, the deceased, while he was not yet Oba of Ilesha in Yorubaland, married according to Christian rites. He later became Oba, and, apparently to emphasize and enhance his new status, took some fifty wives under customary law. He died intestate, leaving two children of the Christian marriage and nine children of the customary unions surviving him. He left some landed property, which was conveyed to the defendant by one of the two children of the Christian marriage, who had taken out letters of administration relating to it. One of the nine children

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1 For some of the cases decided on this equitable rule, see: Crook V. Brooking (1688) 2 Vern.50; Pring v. Pring (1689) 2 Vern.69; Rochefoucauld v. Boustead [1897] 1 Ch.196, and Bannister v. Bannister [1948] 2 All E.R.133  
 2 (1927) 8 N.L.R.68.

of the customary marriages sued to have the conveyance set aside, and for a declaration that the land was the property of all the eleven children. He based his claim on the ground that their father was a pagan living a customary way of life and that, according to the principle laid down in Asiata v. Goncallo<sup>1</sup>, customary law should govern the distribution of their deceased father's estate. The Court rejected the plaintiff's argument and, following the principle laid down in Cole v. Cole<sup>2</sup>, held that English law applied. As regards the plaintiff's specific argument that his father was not a Christian but that Cole was, the Court's answer was that:

"the decision of Cole v. Cole<sup>2</sup> was based not on the fact that the parties were Christian natives,, but on the fact that they had gone through a marriage by Christian rites".<sup>3</sup>

The Court also considered whether there was evidence of the kind of the manner of life of the deceased sufficient to take the case out of the principle enunciated in Cole v Cole<sup>2</sup>, but held there was none. In the words of Petrides,J.,

"... the law will presume that the parties, by going through a marriage according to Christian rites, intended to be bound by its consequences unless there was evidence to the contrary, of which there was none in this case."<sup>4</sup>

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1 (1900) 1 N.L.R.41.

2 (1898) 1 N.L.R.15.

3 (1927) 8 N.L.R. at p.70.

4 (1927) 8 N.L.R. at p.71, emphasis supplied by underlining.

- (d) Where a person not subject to customary law contracts a Christian marriage whether or not under the provisions of the Marriage Act

The situation considered here is that of the succession to the estate of a person not subject to customary law who either marries under the provisions of the Marriage Act in Nigeria, or contracts a Christian marriage outside Nigeria. We may take, for example, an Englishman. If such a person dies intestate domiciled in any of the component units of Nigeria; or dies intestate, whether or not he is also domiciled in any part of Nigeria, leaving immovable property in Nigeria, (including the Federal Territory of Lagos), the distribution of his property will not be governed by the provisions of section 36 of the Marriage Act. This is because, even if he married under the Marriage Act, he was not a person subject to customary law. But there is no uniform law applying to the intestate succession of such a person, and the position differs according as the area concerned is either the Federal Territory of Lagos and the Eastern Region or the Western and Mid-Western Regions.

The Federal Territory of Lagos and the Eastern Region

The applicable law with respect to the succession of the type of intestate now under consideration, if he dies

intestate domiciled in Lagos or the Eastern Region, will be the Statutes of Distribution<sup>1</sup>, as modified by the Intestates Estates Act<sup>2</sup>, and the Statute of Frauds<sup>3</sup>. These statutes, which will govern his personal estate, apply in these parts of Nigeria as statutes of general application. The rules of distribution, as contained in these English statutes, have been discussed at length in an earlier chapter - chapter three.

As regards any immovable property left by such an intestate, the canons of descent contained in the Inheritance Act<sup>4</sup>, the provisions of the Dower Act<sup>5</sup>, of Lord St. Leonard's Act<sup>6</sup>, and the common law rules of descent<sup>7</sup> will govern the inheritance. Again, these rules have already been treated in an earlier section of this chapter.

### The Western and Mid-Western Regions

The position in these two Regions is that both the realty and the personalty of such intestate are subject to the same rules of distribution by virtue of the provisions of the Administration of Estates Law.<sup>8</sup> It must, however,

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1 {1670} 22 & 23 Car.2, c.10; and (1685), 1 Jac.2, c.17.

2 {1890}, 53 & 54 Vict., c.29.

3 {1677}, 29 Car.2, c.3.

4 {1833}, 3 & 4 Will.4, c.106.

5 {1833}, 3 & 4 Will.4, c.105.

6 {1859}, 22 & 23 Vict., c.35.

7 The rights of the Crown to escheat, for instance.

8 Cap.1, vol.1, Laws of the Western Region of Nigeria, 1959.

be emphasized that, since such intestate is not subject to customary law, the rights of the Crown (State) to take the residuary estate as bona vacantia remain unaffected. The provisions of the Administration of Estates Law<sup>1</sup> have been fully set out earlier.

### PARTIAL INTESTACY

The discussion so far has been concerned with the general law relating to total intestacy; that is, where the deceased makes no effective testamentary disposition of any of the property of which he is competent to dispose of by his will. But intestacy may be partial; that is to say, the deceased may leave a will, which is ineffectual as to part only of his property. In this latter case, there is partial intestacy as to such property as he does not effectively dispose of by his will. The rules governing partial intestacy are, broadly speaking, similar to those already discussed in respect of total intestacy. But there are certain modifications where the intestacy is partial. These modifications vary according as the area concerned is the Federal Territory of Lagos and the Eastern Region, on the one hand, or the Western and the Mid-Western Regions on the other.

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1 Cap.1, vol., Laws of the Western Region of Nigeria, 1959.



### Result of partial intestacy

#### (a) The Federal Territory of Lagos and the Eastern Region

Under the old English law of succession, which is still in force in both the Federal Territory of Lagos and the Eastern Region, the rules governing descent to real property are different from those relating to the distribution of personal property. The result is that, if the partial intestacy is in respect of the real estate, it passes exclusively to the heir (the eldest son, for example); while, if it is in respect of the personal estate, the distribution is among the children and widow of the intestate, as has already been seen.

#### Rights of widow under the Intestates Estates Act<sup>1</sup>

It will be recalled that the rights of the surviving widow (additional to her rights under the Statutes of Distribution<sup>2</sup> and the Dower Act<sup>3</sup>) under the Intestates Estates Act<sup>1</sup> exist only in cases of total intestacy. Consequently, she is not entitled to a share in the property in respect of which her husband has died partially intestate<sup>4</sup>.

#### (b) The Western and the Mid-Western Regions

Under the provisions of the Administration of Estates

1 (1890) 53 & 54 Vict., c.29.

2 (1670) (22 & 23 Car.2, c.10), s.3 and (1685) (1 Jac.2, c.17), s.7.

3 (1833) (3 & 4 Will.4, c.105), s.2.

4 In the Estate of Twigg : Twigg v. Black [1892] 1 Ch.579.

Law<sup>1</sup>, any beneficial interests acquired by the issue of the deceased under his will<sup>2</sup>, and any beneficial interests acquired by the surviving spouse under the will of the deceased (other than personal chattels specifically bequeathed<sup>3</sup>), but not those acquired by anyone else<sup>2</sup>, must be brought into account.

This means that in the case of the issue of the deceased, the rule as to hotch-pot applies<sup>2</sup>; and in the case of a surviving spouse, his or her one-half or two-thirds share in the estate (for life) with interest, will be diminished by the value of the beneficial interests received by him or her under the deceased's will<sup>3</sup>.

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1 Laws of the Western Region of Nigeria, 1959, cap.1,s.53.

2 Ibid.,s.53(b).

3 Ibid.,s.53(a).

PART THREE  
ADMINISTRATION OF ESTATES UNDER  
CUSTOMARY LAW

CHAPTER FIVE  
ADMINISTRATION OF ESTATES

1. Burial

When a man dies the most urgent task is his burial which, for obvious reasons, takes place as soon as possible, generally within a day or two after the death. The burial of a deceased chief or other important person or someone dying after attaining venerable old age is usually delayed for about a week or two, the body being specially preserved in the meantime. Thus, among the Bini<sup>1</sup>, the body of a deceased Oba or other prominent chief is not usually interred until about two weeks from the date of death; and Urhobo<sup>2</sup> and Isoko<sup>3</sup> deceased ivie ("kings") and edion (clan headmen) are generally preserved for about a week before being buried. The Ivbiosakon do not normally bury their deceased chief until about the ninth day following his death.<sup>4</sup>

2. Funeral or "second burial"

The actual burial of the deceased must be distinguished from the funeral or "second burial" which,

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1 Bradbury, R.E., The Benin kingdom (1957), p.50.

2 Bradbury, op.cit., p.158.

3 Welch, J.W., "The Isoko tribe" (1934) 7 Afr.160 at p.172, Bradbury, op.cit., p.158.

4 Talbot, P.A., The peoples of southern Nigeria (1926), vol.III, p.486; Bradbury, op.cit., p.98.

as a rule, is performed after the burial. Perhaps, the term "second burial" needs some explanation. It may happen that a man dies at a time when those responsible for the performances of his burial and funeral rites can ill afford, for financial or religious reasons, to accord him a fitting funeral. Rather than put on a poor or inauspicious one, they may decide to be content with carrying out the interment, leaving the performance of the funeral till suitable or better times. When the final mortuary rites are eventually undertaken, the deceased's body already interred is represented, as among the Isoko<sup>1</sup>, by an object, such as a plantain trunk; this object is then buried. It is this ceremony that has been termed "second burial".

A "second burial" does not take place where the funeral has been performed at the time of death or shortly afterwards, but only if the latter ceremony cannot be undertaken as indicated; or where it is dispensed with on religious grounds, for example, where a diviner holds that it be not performed<sup>2</sup>. This distinction has been clearly made by Talbot who says:

" ..in the case of a chief whose body is preserved... while his family are making preparations to give him fitting obsequies, these latter cannot be called 'second

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1 Welch, ibid.

2 Bradbury, op.cit., p.159.

burial' since the corpse has not yet been buried; in the case of an ordinary man whose body is buried at once, the latter ceremonies are sometimes named 'ikwa ozu', 'mourn for the dead', and not 'inu ozu', 'bury the dead'.<sup>1</sup>

The interval between death and the performance of the funeral or "second burial" depends very largely on how soon a sufficient amount of money can be found to pay for the expenses involved; while a rich family will carry out the rites almost immediately after the death and burial; a poor one will almost certainly postpone them indefinitely<sup>2</sup>. Thus, among the Bini, some funerals are known to have been postponed for as much as twenty years after interment<sup>3</sup>. It is the custom among the Bini<sup>3</sup>, Urhobo<sup>4</sup> and Isoko<sup>4</sup> to postpone the performance of the funeral rites if those responsible for carrying them out are either too young or cannot afford the expense at the time of the death.

#### Burial and funeral expenses

Throughout southern Nigeria, funerals and "second burials" are expensive affairs<sup>2</sup>. Their chief features

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- 1 Talbot, op.cit., p.496. Cf. Basden G.T. Among the Ibos (1921), p.122; Basden Niger Ibos (1938), p.292.
  - 2 Thomas, N.W., Anthropological report on the Edo-speaking peoples (1910) pt.1, -.41. Talbot, op.cit., pp.469 and 474; Omoneukanrin, C.O. Itsekiri law and custom (1942), p.69; Okojie, C.G. Ishan native laws and customs (1960), pp.69 and 124.
  - 3 Thomas, ibid., Bradbury, op.cit., p.50. Cf. Meek, C.K. Law and authority in a Nigerian tribe, p.314.
  - 4 Bradbury, op.cit., p.159.

are feasting, dancing and singing; and large sums of money are spent on these. Besides, those celebrating these rites make generous gifts - in cash or kind - to all those invited or present<sup>1</sup>; and these are in addition to the dues which they pay to all sorts of societies, usually secret ones, of which the deceased was a member<sup>2</sup>. No matter how heavy the costs associated with the carrying out of the rites may be, those responsible regard it as a solemn duty to be performed without counting the cost. To them it is a matter of no great moment if they thereby impoverish themselves for years or even run into huge debts<sup>3</sup>.

#### Reasons underlying the performance of the burial and funeral rites

The heavy burden connected with the performance of the deceased's burial and funeral rites is usually unhesitatingly accepted on religious and social grounds. It is generally believed that a funeral or "second burial"

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- 1 Welch, loc.cit; Bradbury, op.cit.p.159, Omoneukarin, op.cit.,p.68.
  - 2 Egharevba, J.U., Benin law and custom (1949), p.72; Dennett, R.E., Nigerian studies (1910), p.31-32; Ajisafe, A.K., Laws and customs of the Yoruba people (1924), p.79; Talbot, op.cit., pp.476-80 and 493; Lucas, J.O., The religion of the Yorubas (1948).p.230.
  - 3 Leonard, A.G., Tribes of the Lower Niger (1906), p.156; Basden, (1921), op.cit., p.121; Basden, (1938), op.cit. p.291; Talbot, op.cit., p.469.

facilitates the entry into the spirit-world of the deceased who has now joined the ancestors whose blessings must be secured for the living relatives; it also prevents him from pursuing and molesting the living relatives, and enhances his prestige in the ghost world.<sup>1</sup> The social position of the deceased's family is also involved in the performance of these rites; and the more lavish and elaborate they are performed, the higher the family status rises in the social scale<sup>2</sup>. This accounts for the fact that the funeral ceremony accorded to a deceased man is generally higher than his station in life really demands<sup>3</sup>. Among the Ibo, "no more abusive remark can be made to a man than 'you never even killed a rat for your father's funeral' "<sup>4</sup>. And among the Ishan, unless a man has performed his deceased father's funeral ceremony, he cannot aspire to promotion to the highest grade of elders (edion)

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- 1 Egharevba, op.cit., p.73; Basden, (1921), op.cit., p.121; Basden (1938), op.cit. pp.201, 269 and 280; Meek, loc.cit.; Lucas, op.cit., pp.234-5. Okojie, op.cit., p.64.
  - 2 Welch, loc.cit.; Egharevba, op.cit., p.73; Omoneukanrin, op.cit., p.69; Okojie, op.cit., p.124.
  - 3 Ward, E., The Yoruba husband-wife code (1938), p.114.
  - 4 Meek, op.cit., p.321.

in the age grade system: no father and son can be odion (elder) together; and until the former's funeral is celebrated, he is regarded as still ritually alive<sup>1</sup>.

To the Western mind, the preceding paragraph may have contained much that should be dismissed as being completely irrelevant to a thesis which claims to treat of the law of succession. It is, of course, readily admitted that some socio-religious considerations have entered this work in the paragraph concerned. It should, however, be borne in mind that we are dealing with the customary law of the African, to whom his reputation, his religion and his law are too intertwined to be separated. Moreover, the customary law of succession has much to do with religion, since its whole basis rests on the devolution and enjoyment of the property left by a deceased person around whom ancestor-worship centres. It has been said that "native law... is inextricably bound up with life and death"<sup>2</sup> and ancestor-worship "enters every phase of life, decides the form of government, imposes morality and secures obedience"<sup>3</sup>.

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- 1 Butcher, H.L.M., "Some aspects of the otu system of the Isa sub-tribe of the Edo people of southern Nigeria" (1935) 8 Afr. 148 at 159.
  - 2 Basden, Niger Ibos (1938), p.xiii.
  - 3 Welch, op.cit., p.73. Cf. Adam, L., Inheritance in primitive cultures (1934-5) X IOWA L.R. p.762, where he says: "primitive inheritance law grew up from an intimate contact with primitive religion, in particular, with the belief in the everlasting presence and influence of the deceased's soul or spirit among the tribe".



It will be seen, when we deal with the duties of the administrator, that the fear of incurring the displeasure of the ancestors constitutes, perhaps, the most effective sanction which ensures that the property comprised in the estate is not fraudulently squandered or misappropriated.

Responsibility for the payment of the burial and funeral expenses

The responsibility for the burial and funeral of the deceased falls mainly on his eldest son, though all the children and relatives of the deceased also take part and join in the contributions towards the expenses involved<sup>1</sup>. If the eldest son is still young or there is no surviving son, the nearest adult male relative - a brother, an uncle or a nephew - plays the leading role. Daughters, on marriage, go to live with their husbands, and do not normally take full part in their family affairs. In any case, the information is that, apart from paying their funeral contributions and preparing and/or serving food and drinks to the mourners and sympathisers, they

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1 Thomas (1910), pt.1, op.cit., pp.40-3; Thomas, N.W., "Notes on Edo burial customs" (1920) 50 J.R.A.I. 377 at pp.384 ff; Thomas N.W., "Some Ibo burial customs" (1917) 47 J.R.A.I. 163 at pp.186-8; Welch, op.cit. pp.172-3; Omoneukanrin, op.cit., p.68; Esenwa, F.E. "Marriage customs in Asaba Division", (1948) XIII Nigerian Field, 71 at p.80; Egharevba, op.cit., p.39; Bradbury, op.cit., pp.50, 80, 98, 108, 124 and 159; Okojie, op.cit. pp.69, 90-1.

usually do not figure prominently in these matters, which are highly charged with sacrifices and ancestor-worship<sup>1</sup>. Similarly, among the Ishan, the eldest daughter of the deceased, except where she is an arebhoa<sup>2</sup>, is only allowed to carry out her deceased father's mortuary rites on the strict understanding that she does so on behalf of her young brother and eldest son of the deceased, who is unable to perform the rites himself by reason of his tender age<sup>3</sup>. This rule is said to have been designed to preclude an eldest daughter of the deceased from taking the dead man's property, which she may carry away from the family to her husband<sup>3</sup>.

1 Ovie of Ughelli and Chief J.A. Akiri.

2 An arebhoa (arhewa) is a man's eldest daughter who is not given in marriage but is permitted to have suitors at her father's house. She is regarded as a son and any children she has belong to her father. The custom is based on the fear of the extinction of the family of a man having only daughters and no sons. See: Thomas, (1910) pt.1, p.79; Thomas, N.W., "Marriage and legal customs of the Edo-speaking peoples" (1910) 11 J. Comp. Leg. (N.S.), 94 at p.99; Thomas, N.W., "The Edo-speaking peoples", (1910) 10 J.A.S., 1 at pp.7-8; Rowling, C.W. Land tenure in Benin province (1948), para.65; Okojie, op.cit., pp.88, 93 and 118. The Mid-Western Ibo equivalent is the idegbe (idebwe) and is said to have spread there from the Ishan area. See: Thomas, (1914) pt IV, op.cit., p.5. For a short description of this custom (idegbe) see: Thomas, ibid, pp.60 ff; Rowling, op.cit., para.99.

3 Okojie, op.cit., p.93.

The duties of the deceased's sons-in-law in connection with the burial and funeral

An interesting aspect of the liability to contribute towards the burial and funeral expenses of the deceased is that relating to the part played by sons-in-law at the burials and funerals of their deceased parents-in-law or near relatives of their wives. Throughout southern Nigeria, persons marrying from the family of the deceased are obliged by custom to assist at the burials and funerals of their deceased parents-in-law and close relatives of their wives, by digging the graves and helping to defray the mortuary expenses incurred<sup>1</sup>.

The liability so to assist may be regarded as being founded upon the prior contract of marriage, an essential term of which is the obligation on the part of the son-in-law to render labour and other forms of services

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1 Thomas, Anthropological report on the Edo-speaking peoples (1910) pt.1, pp.41-2; Thomas, "Some Ibo burial customs" (1917) 47 J.R.A.I. 163 at p.188; Thomas, "Notes on Edo burial customs", (1920) 50 J.R.A.I. 377 at pp.381 ff.; Talbot, vol.III, op.cit., pp.482, 684-5; Welch, op.cit., pp.172-3; Omoneukanrin, Itsekiri law and custom, p.68; Egharevba, Benin law and custom, pp.19 and 22; Bradbury, The Benin kingdom, 457, pp.50, 80, 121 and 159; Okojie, Ishan native laws and customs p.126; Ajisafe, op.cit., p.82; Dennett, op.cit., p.30; Eastern Nigeria Government, Report of the Committee on bride price (1955), paras. 193, 197, 216, 243 and 277.

to the parents and other members of his wife's family<sup>1</sup>.

As the Report of the Committee on bride price (Eastern Nigeria) puts it:

"The labour services and the periodical gifts by the husband to his wife's parents continued after marriage (2).. more importance is attached to the help given by a husband to his wife's family than to the actual dowry...." 3

A son-in-law usually assumes his obligations to assist at the burial and funeral of his deceased parent-in-law without reluctance. His participation in these rites is regarded as strong evidence of his marriage with the deceased's daughter; and it may enable the children of this marriage to enjoy rights in their mother's family.

Son-in-law's assistance at the burial and funeral as evidence of marriage

Among the Bini<sup>4</sup> and Ishan<sup>5</sup>, assistance rendered

- 1 Temietan, S.O., "Marriage among the Jekri ..." (1938) 13 Nigeria 75 at p.76. Esenwa, op.cit., pp.72-3; Bradbury, op.cit., pp.48, 157 and 159; Okojie, op.cit., p.91; Talbot, op.cit., p.442; Eastern Nigeria Government, loc.cit.; Arikpo, O., "The future of bride price" (1955) No.2108 West Africa, issue of October 29th, 1955, p.1017.   
Printer,
- 2 Eastern Nigeria Government} op.cit., para.23.
- 3 Eastern Nigeria Government} op.cit., para.39; see also para.277.
- 4 Thomas, (1910) pt.1, loc.cit.
- 5 Okojie, op.cit., p.126.

by a son-in-law at the burial and funeral of his deceased parent-in-law furnishes the clearest evidence of his having been recognised as the legal husband of the deceased's daughter; and it at once differentiates him from a man establishing a mere passing liaison with the daughter of the deceased. In point of fact, it is the custom not to allow a mere lover of the daughter of the deceased to have anything to do with the burial and funeral. Among the Urhobo and Isoko, this obligation on the part of the son-in-law arises immediately the consent of the parents of the girl is given in respect of the marriage between their daughter and the suitor<sup>1</sup>.

Rights enjoyed by the children of the marriage by virtue of their father's participation in the burial and funeral of their deceased maternal grandparent.

Participation by the son-in-law in his deceased parent-in-law's burial and funeral has its compensating side. Such assistance smooths the way for his children when they are compelled to turn to their mothers' families for help which cannot be got from him or his family. Furthermore, and this is more important, no member of the children's maternal families is likely to raise any

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1 Bradbury, op.cit., p.157.

serious objections should they (the children) some day stand to inherit property or titles from these maternal families. Thus, among the Urhobo, sons obtain land for cultivation from their mothers' families, where that owned by their fathers' families is insufficient<sup>1</sup>; and among the Bini, it sometimes happens, as Bradbury points out, that a titled man having only daughters may pass his title to a son of his eldest daughter<sup>2</sup>.

It is common among some sections of the Yoruba for men to obtain or even inherit land from their mothers' families<sup>3</sup>; and for the male descendants of a female member of the family to take as wife the widow of his mother's deceased relative<sup>4</sup>. Similarly, a male descendant of a female member of the family has the right to contest for a title vested in his mother's family<sup>5</sup>, though it is stated that his chances of being selected are rather remote<sup>6</sup>.

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1 Thomas, Anthropological report on the Edo-speaking peoples, (1910) pt.I,p.93.

2 Bradbury, The Benin kingdom (1957),p.30.

3 Lloyd, P.C., "Sacred kingship and government among the Yoruba" (1960) 30 Afr.221, at p.234; Lloyd, Yoruba land law (1962), pp.211 ff, 239 ff. and 279.

4 Schwab, W.B., "The terminology of kinship and marriage among the Yoruba" (1958) 28 Afr.352 at p.372.

5 Lloyd, "The Yoruba lineage" (1955) 25 Afr.235 at p.246; Schwab, ibid.

6 Schwab, ibid.

Burial and funeral expenses borne by a son-in-law may form part of refundable bride price in parts of the Eastern Region of Nigeria.

In some parts of the Eastern Region of Nigeria, a son-in-law has greater reasons for, and derives more immediate and personal advantages from, helping to defray the burial and funeral expenses of his parent-in-law. This is because among the Ibibio<sup>1</sup>, the Okrika Ijaw<sup>2</sup> and the Ibo of Ahoada Division<sup>3</sup>, such expenses form part of the bride price, refundable on the dissolution of marriage. The custom is, however, becoming unpopular among the Ibo of Ahoada Division where bye-laws have been passed against it by the local government authorities<sup>3</sup>.

#### LEGAL RELEVANCE OF THE PERFORMANCE OF THE BURIAL AND FUNERAL RITES

The performance of the burial and funeral ceremony of the deceased is intimately linked with the inheritance of his property. This means that, barring the position of a son-in-law who, as has been pointed out, assists on a contractual basis, those persons who have carried out

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1 The Eastern Nigeria Government Printer, Report on the Committee on bride price (1955) para.277.

2 Ibid., para.243.

3 Ibid., para.197.

these rites - the members of the family - stand to inherit the estate left by the dead man<sup>1</sup>. The Ishan maxim expressing the connection between the performance of the burial and funeral rites and the inheritance of the estate runs:

"Ono to Olinmin ole yan Uwa" (He who performs the Burial Ceremonies owns the house and all therein 2).

The importance of this connection is such that a stranger or friend may be admitted to participation in the scheme of inheritance, if he takes part in the burial and funeral ceremony of the deceased. Thus, Meek states:

"A friend who has lived with a family and has helped the head of the family to establish and maintain the family property, and on the death of the headman has borne a major share of the burial expenses, may well be regarded as having established a claim, or even the first claim, to a share of the dead headman's estate"<sup>3</sup>.

Kingsley sums it up, when she says:

"By taking charge of and interring a body, you become the executor of the deceased man's estate ... a good deal can be made by an executor"<sup>4</sup>.

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- 1 For the position in the Mid-Western Region, see generally: Roth, Great Benin (1903)p.97; Talbot, The peoples of southern Nigeria (1926), vol.III, pp.683 ff.; Thomas, (1910) pt.1, pp.66 ff.; Thomas, (1914), pt.IV, pp.128 ff.; Thomas, (1910) 11 J. Comp.Leg.(N.S.) 94; Thomas, (1910) 10 J.A.S.1.; Ward Price, H.L., Land tenure in the Yoruba Provinces, (1933) para.374 (on the Bini); Omoneukanrin, op.cit., p.73; Egharevba, op.cit., pp.38 and 76; Rowling, op.cit. paras. 24,49,65 and 99; Okojie, op.cit., pp.64, 90-2 and 127.
  - 2 Okojie, op.cit., pp.64 and 127; cf. Thomas (1910), pt.1, pp.70 and 80. The position is the same among the Bini, Ivbiosakon, Ibo and, indeed, throughout the Region. See: Thomas, (1910) pt.1, pp.69,70,74-5,89-10; Thomas, (1914), pt.IV, p.128; Talbot, op.cit., p.684; Egharevba, op.cit. p.33; and information collected from Chiefs Salubi, Ekpekepei and Aborosan.
  - 3 Meek, Land tenure and land administration in Nigeria (1957).



Relatives older than the deceased may not take part (or active part) in the burial and funeral ceremony

The connection between the celebration of the burial and funeral rites of a dead man and the subsequent succession to his property is also brought out by the rule which excludes relatives older than the deceased from participation or active participation in the performance of his burial and funeral ceremony, on the ground that they are usually not entitled to take property from a younger member of the family. A learned author makes this point when he observes that "no person plays an active part in the funeral rites for someone junior to himself"<sup>5</sup>.

This rule is most rigidly adhered to among the Yoruba, where it is stated to have been based on the fact that an older (and often wiser) relative might try to kill, by subtle means, a younger but prosperous member of the family, had the position been otherwise<sup>6</sup>. Among the Urhobo, the information is that an older relative views the death of a younger one as an unnatural and extremely sad event,

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....p.180. But such a friend must be considered as having been fully incorporated into the family.

<sup>4</sup> Kingsley, M.H., West African studies (1899), p.434.

<sup>5</sup> Bradbury, The Benin kingdom (1957), p.50; also at p.97.

<sup>6</sup> Lloyd, (1955) 25 Afr. 235 at p.241; Lloyd, [1959] J.A.L.7 at p.19; Lloyd, Yoruba land law (1962)p.293; Morton-Williams, P. "Yoruba responses to the fear of death", (1960) 30 Afr. p.34.

enough to create in him distaste for the inheritance of the latter's property<sup>1</sup>.

As will be more fully explained in the chapters on the distribution of estates, the rule excluding older relatives from the inheritance is not observed where the deceased is not survived by close relatives. Thus, as regards the Ishan custom, whereby the widow of the deceased is taken as wife by his relative, Okojie writes:

"...it was not customary for a man to 'inherit'<sup>2</sup> the wives<sub>3</sub> of his junior brother, unless there were no other brothers<sup>3</sup>".

It is, however, not clear whether such an older relative thus benefiting from the death of the younger one is still prohibited from undertaking the latter's funeral; or whether he is obliged to carry out the funeral. Having regard to the link between the performance of this ceremony and the succession to the rights of the deceased, already considered, it is difficult to resist the view that such an older relative is bound to give the dead man burial and funeral. Concerning the particular Ishan custom referred to, it must be observed that the Ishan dread of offending the dead -

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1 Chief T.E.A. Salubi.

2 Quotation marks supplied by the present writer to indicate that that word(inherit) is, as will be shown in chapter seven, inappropriate.

3 Okojie, Ishan native laws and customs (1960),p.121.

believed to have joined the powerful band of the departed but watchful ancestors<sup>1</sup> - must impel the older relative to honour his deceased kinsman. Furthermore, it has been pointed out that the Ishan regard as still being ritually alive, a deceased person whose burial and funeral rites have not been performed. In these circumstances, therefore, marriage with his widow prior to the celebration of rites, designed to dismiss him from this world, may not only be adulterous, but, indeed, dangerous.

FAILURE TO PARTICIPATE IN THE PERFORMANCE OF THE BURIAL  
AND FUNERAL

With the exception of the position of the son-in-law already noted, it may be stated that just as participation in the carrying out of the burial and funeral rites of the dead man generally confers upon those so participating the right to inherit from the estate, so does non-participation in such rites negatively affect the right to inherit. The position in each of the Regions in our area of general reference will be considered separately. With the exception of the Mid-Western Region where, as has been seen, there are various ethnic groups, the Regions are referred to by the names of the groups or main groups

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1 Okojie, op.cit., pp.91-2 and 121.

inhabiting them; Lagos is included in the Western Region, or regarded as Yoruba for our purpose.

Yoruba customary law

It is a strict rule of the Yoruba customary law that anyone who has not contributed towards the funeral of the deceased is not entitled to benefit from the property left by the latter<sup>1</sup>.

The case of Salami v. Salami and anor.<sup>2</sup> seems, on first reading, to be in conflict with the rule of the Yoruba customary law stated above. The headnote of the report of the case reads:

"...Right of child to inherit father's estate notwithstanding her absence or minority at father's death".<sup>2</sup>

Briefly, the facts of the case were as follows: the parties were the surviving children of one Salami Goodluck, a Yoruba from Abeokuta, who died intestate leaving a house, some farmlands and movables at Abeokuta. Soon after the death of her father in 1927, the plaintiff, then about seven years of age, was taken to the then French Cameroons by her mother. She (the plaintiff) did not return to Nigeria until 1953. However, while she was in the Cameroons, her

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1 Ajisafe, A.K. Laws and customs of the Yoruba people (1924) p.83; Lloyd, [1959] J.A.L.7 at p.16; Lloyd, Yoruba land law (1962), pp.287 and 296.

2 [1957] W.N.L.R.10.

deceased father's estate was distributed; and, apart from some clothes and two chairs reserved for her, she received no benefit from the estate. She sued her two brothers for an account and prayed for partition of the estate.

Irwin, J., accepted the evidence of the plaintiff's witness to the effect that a son and a daughter were equally entitled to share in their deceased father's estate, provided they both joined in performing his burial and funeral ceremony. Nevertheless, he said, inter alia,

"but I cannot think that the right of a child to inherit can be affected by his or her absence or minority at the time of death." 1

This is tantamount to saying that funeral expenses can be charged against the estate; and it would seem that actual contribution towards the funeral expenses will only be expected from the living relatives of the deceased where the estate left by him is insufficient to defray the cost of his burial and funeral. This is an eminently sensible practice; it obtains among the Itsekiri<sup>2</sup> and Ishan<sup>3</sup> of the Mid-Western Region, and there is no reason to suppose that it is not widespread generally.<sup>4</sup>

1 [1957] W.N.L.R.10 at 11.

2 Omoneukanrin, Itsekiri law and custom, p.67.

3 Okojie, Ishan native laws and customs, pp.69 and 124.

4 Talbot, The peoples of southern Nigeria, 1926, vol.III, p.474. Meek, Law and authority in a Nigerian tribe, 1937, p.320.; Lloyd, "Some notes on the Yoruba rules of succession..." [1959] J.A.L.7 at p.16. ; Lloyd, Yoruba land law, 1962, p.287.

The conflict between the decision in the Salami<sup>1</sup> case and the traditional Yoruba rule, which excludes a non-contributor to the deceased's funeral expenses from inheriting, is more apparent than real. Ajisafe himself, a most widely cited authority on Yoruba law, lists several exceptions to the rule. These include absence, sickness and any other causes unavoidably preventing a person from participating at the funeral. Now, the plaintiff in the Salami case<sup>1</sup> was a young girl of about seven years of age at the time of her father's death; she, clearly, could not be expected to possess the means of making a funeral contribution. Besides, she had left Abeokuta and, indeed, Nigeria soon after her father's death; and the funeral probably took place in her absence. It is admitted that the exceptions listed by Ajisafe deal with the position of a son-in-law of the deceased. It is, however, submitted that, bearing in mind the fairly strict obligation resting on a son-in-law in this matter, there is no reason why the exceptions referred to cannot avail a child of the deceased circumstanced as the plaintiff in the Salami case<sup>1</sup>.

The position in the Mid-Western Region

In the Mid-Western Region, failure to contribute

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1 [1957] W.N.L.R.10.

towards the burial and funeral expenses of a deceased person does not completely wipe out the defaulter's rights of inheritance in respect of the deceased's estate. It merely restricts either the duration of the inheritor's enjoyment of the inherited property<sup>1</sup>; or the quantum of share he gets on distribution<sup>2</sup>. Ward Price, however, states that the defaulter, among the Bini, may not inherit at all<sup>3</sup>. With the greatest respect, this statement does not represent the Benin customary law, which has been stated by Egharevba as follows:

"If the eldest son does not perform the funeral ceremonies at once, and dies before he has completed them, the right of inheritance goes to the second son and his children, provided he carries out the funeral rites. If, however, the eldest son has spent a good deal of money on the house [i.e. part of the inherited property] before he died ... the second son who inherits the property must compensate the children of the first son, to the amount he spent on the improvement of the house....." 4

Similarly, the position among the Ishan has been stated by Bradbury in this way:

"The eldest surviving son.... must validate his claim by properly carrying out his father's funeral ceremonies. If he fails to do this he still retains the property until his death, but his brother might step in and perform the rites and take over the property". 5

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1 Egharevba, Benin law and custom, p.39; Bradbury, The Benin kingdom, 1957, pp.47 and 77; Okojie, op.cit., pp.63,68 and 126.

2 Egharevba, op.cit., p.38.

3 Ward Price, Land tenure in the Yoruba Provinces (1933) para.374.

4 Egharevba, op.cit., p.39. Cf. the Benin case of Iyamuse Ehigie v. Gregory Ehigie [1961] All N.L.R.842 at p.845; [1961] W.N.L.R. 307 at p.309; where the president of

The restriction to life interests of the inheritance rights of an eldest son, who has not performed his deceased father's funeral, can have an important effect on the rights of his (eldest son's) children in the cases of estates of substantial value, and also of titles, such as chieftaincies. The Ishan make no distinction between different kinds of property; whether the property to be inherited is movable or immovable, or it is incorporeal property, such as a title, the rule is the same<sup>6</sup>. Both the Bini and Urhobo, however, distinguish between succession to a title (a chieftaincy, for example) and the inheritance of other kinds of property. In the latter case, the beneficiary still takes whether he has carried out the funeral rites of the deceased or not. In the former case, the person normally entitled to succeed to the chieftaincy is debarred from succeeding if he fails to perform the funeral of the former holder of the title. Thus, among the Bini,

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....of the grade "A" customary court, Benin, said: If the eldest surviving male child dies without performing the customary funeral ceremonies for his deceased father's burial, the right of inheritance passes on to the next junior brother who performs the ceremonies".

5 Bradbury, op.cit., p.77; also Okojie, op.cit., pp.63, 68 and 127.

6 Okojie, Ishan native laws and customs, pp.63,68 and 126; Talbot, vol.III, op.cit., p.590.



the eldest son of a deceased Oba succeeds his father, but though he is entitled to succeed, "he was only king elect until every rite was performed"<sup>1</sup>. Similarly, among the Urhobo, the eldest son of a deceased ovie ("king"), who normally succeeds his father, must carry out the deceased ovie's funeral before succeeding for, "until he [i.e. the deceased ovie] is buried the head son is not deemed to have succeeded"<sup>2</sup>

#### The position among the Ibo of the Eastern Region

The rule gearing the right to inherit from the deceased to the antecedent performance of his funeral is sometimes circumvented by the Ibo<sup>3</sup>. As will be shown later, it is a general rule that the estate left by the deceased may not be distributed until the conclusion of his funeral rites. Where, however, the deceased's property is urgently required, and yet the possibility of carrying out the funeral is remote, those responsible for carrying out the rites simulate performance; they fire guns, after which the estate is, apparently, safely distributed.<sup>3</sup>

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1 Roth, Great Benin, p.101, quoting Punch.

2 Thomas, "Notes on Edo burial customs", (1920) 50 J.R. A.I. 381 at p.405; cf. Talbot, The peoples of southern Nigeria, vol.III, p.487.

3 Meek, Law and authority in a Nigerian tribe, (1937), p.318.

Failure on the part of a son-in-law to assist at the funeral of his deceased parent-in-law

In the Mid-Western Region, a son-in-law may, by his failure to help in carrying out the funeral of his parent-in-law, run the risk of losing the deceased's daughter as a wife or, in all certainty of throwing a heavy strain on the success of the marriage between him and the deceased's daughter. Thus, among the Bini, such a son-in-law falls out of favour with his wife's family, who would be justified in putting an end to the continued existence of the marriage<sup>1</sup>. Among the Isoko, the wife of such a son-in-law may refuse to obey his orders and requests<sup>2</sup>. She may also refuse to return to the matrimonial home from her father's family residence until the husband has, so to speak, purged his contempt for her family by paying his share of her deceased parent's funeral expenses<sup>2</sup>. Should the son-in-law refuse or neglect to comply, the refusal of his wife to return to the matrimonial home may well constitute the first step towards the dissolution of the marriage.

It has already been pointed out that a son-in-law's participation in the performance of his deceased parent-in-law's funeral furnishes evidence of the marriage between

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1 Egharevba, Benin law and custom, p.73. The rule is the same among the Yoruba. See: Ajisafe, Laws and customs of the Yoruba people, p.83.

2 Welch, "The Isoko tribe" (1934) 7 Afr.160 at p.173.

him and the daughter of the deceased; and that men enjoying only loose and irregular unions short of marriage with the daughters of deceased persons are not permitted to take part in the latter's funerals. It will be apparent when we shall consider the status of children that the institution of marriage generally determines the question of the affiliation of children. This being so, a son-in-law failing to discharge his obligation in connection with the performance of the funeral of his deceased parent-in-law may unwittingly jeopardise the continued exercise of his parental rights over the children of the marriage between him and the daughter of the deceased. This is because he has, by his failure to discharge his obligation, cast a doubt on the marriage - an institution that, in general, decides the question of legal paternity. It is submitted that, in such a case, it would clearly be open to the members of the deceased's family to take the view that what had hitherto passed for a marriage and respectability was, after all, nothing but an illicit and temporary association, the children of which should belong not to the alleged son-in-law; but to them as the mother's family.<sup>1</sup>

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1 In those societies where, by the system of marriage, the children are affiliated to the mother's family, this step would undoubtedly, be unnecessary. Nor would it (step) be taken by the woman's family among those ethnic groups in which biological paternity determines the legal paternity of a child.

It is further submitted that the possibility of risking the sudden loss of his children in this way, together with resultant drop in his social status, must be considered as one of the sanctions<sup>1</sup> for failure on the part of a son-in-law to assist at the funeral of his deceased parent-in-law.

The failure of a son-in-law to participate in the carrying out of the funeral of his deceased parent-in-law may well prejudice the position of his children by the deceased's daughter, in respect of the enjoyment of the property and rights belonging to their mother's family. This family would almost certainly entertain some grave reservations about the advisability of allowing the children to benefit from them by way of gift or inheritance when their father is unable or unwilling to discharge his obligation to them (their mother's family).

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1 Stemming from what has been stated in note 1 on p.174, this sanction would not operate in societies where, from the system of marriage, the children already belong to their mother's family; or where biological paternity not necessarily marriage, determines the legal paternity of a child.

## CHAPTER SIX

### ADMINISTRATION OF ESTATES (CONTINUED)

#### THE ADMINISTRATOR - APPOINTMENT, RIGHTS, DUTIES, POWERS AND LIABILITIES OF

##### Who is he?

The administrator is the person charged with the responsibility for the performance of the burial and funeral rites of the deceased, and the management and preservation of the latter's estate pending the distribution thereof among those entitled.

##### APPOINTMENT OF ADMINISTRATOR

Under the traditional system, the appointment of an administrator in respect of the deceased's estate was the exclusive responsibility of the family. Nowadays, and especially in cases of disputed succession, however, the appointment may be made by the court. We shall consider first the appointment made by the family of the dead man.

##### Appointment by the family of the deceased

Soon after the death of the deceased, it is usual for his family, at the family meeting, to assign to one of their members the responsibility for the overall supervision of the burial and funeral of the deceased as well

as the control and management of the property comprised in the dead man's estate. As a rule, the member assigned this task is invariably the person entitled to benefit either exclusively or substantially from the estate on its distribution; or, where such a person is too young to assume such responsibility, some adult relative acting on behalf of a beneficiary of tender age. Sometimes, however, the deceased himself may, as a dying wish, nominate one or more persons to carry out this task. But, as will be shown later, such nomination by the deceased may be ignored by the family. The person selected by the family or nominated by the deceased, as indicated above, we may term the "administrator".

It may be argued that while the term "administrator" may be considered appropriate in designating the appointee by the family, it does not accurately describe the case of the nominee appointed (or recommended) by the deceased himself; and that in this latter case, the term "executor" would be more appropriate. Nevertheless, it is intended to employ the term "administrator" in this work in designating the person in charge of the burial and funeral rites and the property of the deceased, whether he is appointed by the family or nominated by the dead man himself. There are several reasons for adopting this course. First, as

will become apparent later, the deceased's nominee may act only if he is approved of by the family. Secondly, the deceased may limit the duties to be performed by his nominee to only those relating to his (the deceased) being accorded a worthy burial and funeral<sup>1</sup>; and thereby render meaningless the necessity for the office of an executor<sup>2</sup>. Thirdly, unlike the position among the English, who at one time viewed dying intestate with peculiar horror<sup>3</sup>; under customary law, intestate succession is the rule<sup>4</sup>.

Among the Yoruba, the appointment of an administrator is made by the elders of the family of the dead man<sup>5</sup>. He is called babansinku (the father of the burial and funeral)<sup>6</sup>, and he is usually the eldest son of the

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- 1 See for instance: Basden, Among the Ibos (1921) p.87; Basden, Niger Ibos (1938) pp.201 and 280; Meek, Law and authority in a Nigerian tribe (1937) p.303.
  - 2 For the distinction between the executor and administrator under English law, see Williams on Executors and Administrators, (1960), 14th edn., vol.1, chaps.2, 14 and 15.
  - 3 Holdsworth, W., History of English law, vol.II, p.93.
  - 4 See for instance: Elias, Groundwork of Nigerian law (1953) p.337; Elias, Nigerian land law and custom (1962), 3rd edn, p.228; Lloyd, "Some notes on the Yoruba rules of Succession" [1959] J.A.L.7, at pp.17-18; Lloyd, Yoruba land law (1962), p.290.
  - 5 Lloyd, [1959] J.A.L.7, at pp.15-16; Lloyd, Yoruba land law, p.287.
  - 6 Ajisafe, Laws and customs of the Yoruba people (1924) p.81; Lloyd, [1959] J.A.L. loc.cit; Lloyd (1962), loc.cit.

deceased or, if he is too young to act, the deceased's younger brother may be appointed.<sup>1</sup>

Among the Ibo<sup>2</sup>, the administrator is appointed on the same considerations as those indicated in connection with the practice found among the Yoruba. Some writers, however, refer to the Ibo administrator as guardian of the deceased's young children and manager of their property<sup>3</sup>-functions which, as will be shown later, are not unconnected with some of the duties of the administrator.

Precisely the same kinship considerations that govern the appointment of the administrator among the Yoruba and Ibo are observed in the Mid-Western Region<sup>4</sup>. He is appointed by or with the co-operation of the family; and is

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- 1 Lloyd, [1959] J.A.L.7, at pp.15-16 ; Lloyd, Yoruba land law, p.287.
  - 2 Thomas, Anthropological report on Ibo-speaking peoples (1914), pt.IV, pp.133-6; Basden, Niger Ibos (1938)p.280; Meek, op.cit., pp.230 and 324;
  - 3 Meek, op.cit., p.322; Green, Land tenure in an Ibo village (1941) p.15; Talbot, The peoples of southern Nigeria, (1926), vol.III, p.687; Chubb, L.T., Ibo land tenure (1961) para.39; Obi, The Ibo law of property (1963)p.152.
  - 4 Thomas, "Marriage and legal customs of the Edo-speaking peoples" (1910) 11 J.Comp.Leg. (N.S.) 94, at p.99; Thomas, Anthropological report on the Edo-speaking peoples (1910), pt.1, pp.68 ff; Thomas, (1914), pt.IV, loc.cit; Omoneukanrin, Itsekiri law and custom (1942) pp.67 and 73; Egharevba, Benin law and custom (1949) pp.73 and 74; Okojie, Ishan native laws and customs (1960) pp.90-91.



usually the kinsman entitled to inherit the deceased's estate or a substantial share of it. If he is still young, an older male relative, such as an uncle, may administer the estate till he comes of age<sup>1</sup>.

The administrator nominated by the deceased: the attitude of the latter's family to such nomination

As has been stated, the dead man himself may sometimes indicate whom his administrator may be. This is the position among the Yoruba,<sup>2</sup> Ibo<sup>3</sup>, Bini<sup>4</sup> and Ivbiosakon<sup>5</sup>. As a general rule, the person so nominated by the deceased is a close relative - a son or brother - whom the family would normally have considered as one of the candidates for such an appointment. Where this is the case, they almost invariably accept the deceased's nomination, which is confirmed usually at the family meeting.

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1 Thomas, (1910), pt.1, pp.68 ff, 78-9 and 84-6; Thomas (1914), pt.IV, pp.120, 133-5; Talbot, (1926), vol.III, p.686; Omoneukanrin, op.cit., p.74; Bradbury, op.cit., pp.47,77,107 and 137; Okojie, op.cit., pp.90-2.

2 Lloyd, [1959] J.A.L.7, at p.18; Lloyd, Yoruba land law (1962) p.290.

3 Meek, Law and authority in a Nigerian tribe (1937), p.303.

4 Thomas (1910), pt.1, p.89.

5 Thomas, ibid, p.90.

It is, however, stated that the deceased - among the Ibo - may apparently nominate anyone, including a friend or stranger, as his administrator<sup>1</sup>. This raises the question as to whether the family of the dead man are concluded by his choice of administrator; or whether they are at liberty to reject his nominee, and select someone else. The answer to this question depends upon several factors, chief among which include the relationship existing between the family and the friend nominated by the deceased; the nature of the property to be administered; and the publicity or secrecy attending the deceased's designation of his administrator. We shall take these points one by one.

The relationship between the family and the friend nominated by the deceased

If the deceased's nominee is a close friend of the family or a person who, though having no blood relationship with the family, can be regarded as having been "incorporated" into the family, he is unlikely to encounter opposition from them. They will confirm his appointment; he may carry out his duties. This is because such a friend may be appointed by the family in his own right.

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1 Meek, Law and authority in a Nigerian tribe (1937), p.303.

On the other hand, the case of the complete stranger nominated by the deceased stands on a different footing. The close connection between the performance of the burial and funeral ceremony of the deceased and the actual inheritance of his property has been emphasized in sundry places. In these circumstances, it is not difficult to appreciate that the family of the dead man are most unlikely to co-operate with him - a situation sufficient to frustrate any attempts on his part to carry out his duties. Furthermore, there can be no gainsaying as regards the hostility which the family will show towards this type of administrator; and there is judicial authority to the effect that it is improper to appoint as administrator, someone not friendly with the family of the deceased<sup>1</sup>.

The nature of property to be administered

If the property concerned belonged exclusively to the deceased and is not, as we shall see, specifically reserved by law for a particular beneficiary, the family may, subject to what has been stated above, permit the nominated administrator to discharge his duties. If, however, it consists wholly or largely of family property over which the deceased formerly exercised mere power of control, the family will have far greater reasons for

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1 Aileru and ors. v. Anibi (1952) 20 N.L.R.46.

opposing the nominated administrator. This is because, as will be apparent later, until there is partition of such property, no member of the family has any identifiable or separate interest in it, which he may deal with as his own; and in respect of which he is competent to appoint an administrator.

The publicity or secrecy that has attended the nomination of the administrator

Concerning the amount of publicity accompanying the nomination, it may be stated that although, as will be shown, this is not a legal requirement, it is of some practical importance that the deceased should have expressly notified the members of his family of his instructions. Otherwise, they may treat them as mere expression of desire rather than the solemn obligatory wishes of a deceased person. For, as a learned author puts it, "secrecy is often allied to forgery"<sup>1</sup>.

Appointment by court

Lagos

Introduction

There are no customary courts in the Federal Territory

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1 Lloyd, [1959] J.A.L.7, at p.18; Lloyd, Yoruba land law (1962) p.291.

184

of Lagos<sup>1</sup>, and no specially enacted Act containing provisions for the administration of estates governed by customary law in the Federal Territory. This does not, however, mean that estates devolving in accordance with customary law situated in Lagos cannot be administered therein. The absence of customary courts in the Federal Territory is due, perhaps, to the heterogeneous nature of the local community inhabiting the Territory. The legislature has tackled the problem of the absence of customary courts in Lagos by enacting Acts which, while containing the general law provisions, nevertheless provide for the observance and enforcement of appropriate customary law or laws subject to their satisfying the repugnancy principle.

Thus, while the Administration (Real Estate) Act<sup>2</sup> sets out the general law relating to the administration of real property left by an intestate, it nevertheless provides for the operation of customary law rules of

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1 Allott, A.N. Judicial and legal systems in Africa (1962) p.47; Park A.E.W. The sources of Nigerian law (1963), pp.68 and 118; Nwabueze, B.O. The machinery of justice in Nigeria (1963) p.32.

2 Laws of the Federation of Nigeria and Lagos (1958), cap.2; formerly designated as The Administration (Real Estate) Ordinance. As Ordinances have now been renamed "Acts" (Designation of Ordinances Act, No.57 of 1961), all Ordinances are referred to as Acts in this work.

devolution in section 2 which reads:

"Provided always the real property the succession to which cannot by native law and custom be affected by testamentary disposition shall descend in accordance with the provisions of such native law or custom anything herein contained to the contrary notwithstanding...."

Similarly, the Administrator-General's Act<sup>1</sup> provides for the administration of all estates defined as "unrepresented" whether governed by the general law or by customary law<sup>2</sup>.

By far the most general provisions designed to ensure the observance and enforcement of applicable customary law are those contained in the High Court of Lagos Act<sup>3</sup>, section 27(1) of which reads as follows:

"The High Court shall observe and enforce the observance of every native law and custom which is applicable and is not repugnant to natural justice, equity and good conscience nor incompatible either directly or by implication with any law for the time being in force...."

Under the second subsection it is provided that customary law shall be deemed to be applicable

"in causes and matters where the parties thereto are natives and also in causes and matters between natives and non-natives where it may appear to the court that substantial injustice would be done to either party by a strict adherence to any rules of law which would otherwise be applicable."

The Court having jurisdiction to appoint the administrator

The High Court of Lagos is the only competent Court

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1 Laws of the Federation of Nigeria and Lagos (1958), cap.4.

2 Ibid., s.31(2).

3 Laws of the Federation of Nigeria and Lagos (1958), cap.80. Cf. the Magistrates' Court (Lagos) Act, s.22(1).

that is vested with jurisdiction to appoint an administrator in respect of an estate. This is expressly provided in section 11 of the High Court of Lagos Act<sup>1</sup>, which vests in the High Court jurisdiction

"... for the administration or control of property and persons..."

in the Federal Territory of Lagos.

The jurisdiction of the magistrate's court in this matter is not quite clear. Section 14(2) of the Magistrates' Court (Lagos) Act<sup>2</sup> excludes the original jurisdiction of the court in any cause or matter which

"raises any issue as to the validity of any devise, bequest or limitation under any will or settlement".

It is arguable that it (the subsection) contains nothing excluding the original jurisdiction of the court in matters relating to the administration of estates either under the general law or under customary law. In contrast the provisions of the Magistrates' Courts Laws of the southern Regions, which exclude the original jurisdiction of the magistrates' courts in these causes and matters, are distinguished by their clarity. Thus, the relevant provisions of the Magistrates' Courts Law, Western Region, exclude the original jurisdiction of magistrates'

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1 Cap.80, op.cit.

2 Ibid, cap.113.

courts in causes or matters "relating to inheritance upon intestacy under customary law and the administration of intestate estates under customary law".(1)

The Magistrates' Courts Law of the Eastern Region excludes the original jurisdiction in suits in which

"the validity of any devise, bequest or limitation under a will or settlement is or may be disputed or in any matter which is subject to the jurisdiction of a native court relating to marriage, family status, guardianship of children, inheritance or disposition of property on death," (2)

However, we shall have the occasion, at a later section, of this chapter, to point out that the words employed in these provisions of the Magistrates' Courts Law are not extensive enough to exclude the original jurisdiction of the court in all suits relating to matters governed by customary law enumerated above.

It is, of course, arguable that it does not matter much in which of the Courts in Lagos - the magistrates' court or the High Court - an application is made for the grant of administration; and that the whole question is, therefore, largely one of academic interest only. However, one has only to examine the Rules of the High Court regulating the incidence of costs in order to appreciate the practical nature of the question - a

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1 Laws of the Western Region, 1959, cap.74, ss.19(4) and 20(d).

2 No.10 of 1955, s.17.



successful party may have the costs, to which he would have been entitled, considerably reduced, if he commenced in the High Court proceedings which he ought to have instituted in the court below<sup>1</sup>.

Who is a "native"?

It will be recalled that we have reproduced in full, in chapter three, the statutory provisions which defined the term "native"; and we mentioned the fact that these provisions had been repealed. It has also been noticed that, notwithstanding the repeal of these provisions, that term is still contained in the provisions of both the Magistrates' Court Act and the High Court Act at present in force in Lagos.

As regards the persons covered by the definition of the word "native", it may be repeated that they must be the descendants of a parent or parents who are or were members of a tribe indigenous to Nigeria; or to some part of Africa. And, as will be remembered, we advanced two

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1 See Order XIV, Rule 12 of the Supreme Court (Civil Procedure) Rules, cap.211, Laws of Nigeria, 1948 edn. These Rules still regulate the practice and procedure followed by the High Court of Lagos by virtue of the High Court of Lagos Act, cap.80, s.89(3), Laws of the Federation of Nigeria and Lagos, 1958.

submissions: one was that the definition was broad enough to accommodate American negroes and West Indians of African origin (since they are descendants of persons who were members of tribes indigenous to Africa), but not Europeans or Asians, notwithstanding their acquisition of Nigerian nationality or domicile in Lagos; the other was that the repeal of the statutory provisions defining the term would not prevent the courts in Lagos from referring to, and acting on, the definition contained therein.

#### Proceedings relating to the grant of administration

The prospective administrator applies to the High Court for the grant of letters of administration in the normal way in which applications are made to the Court. However, since the grounds upon which his application is based are those under the customary law, the Court is obliged, as has been stated, to consider the applicable customary law; and ensure that effect is given to it, if it satisfies the repugnancy principle.

#### Proof of the applicable customary law

It is not enough for the applicant to rely on a rule of customary law in support of his application for

the grant of letters of administration. In order to succeed, he must establish the particular rule of the customary law by evidence<sup>1</sup>. This is because the Court treats customary law as a question of fact, unless judicial notice can be taken of it by reason of its notoriety and the fact that it has been acted upon by the courts<sup>2</sup>.

- 1 The Evidence Act, cap.62, s.14, Laws of the Federation of Nigeria and Lagos (1958); also Fahm v. Ogbojulongun and anor. (1935) 12 N.L.R.47; Jones v. Martins (1943) 9 W.A.C.A.100; George v. Administrator-General and anor. (1955) 21 N.L.R.83. In addition to oral evidence (of experts and traditional chiefs), customary law may be proved by means of any book or manuscript recognised as legal authority by those subject to the particular customary law: ss.56 and 58 of the Evidence Act, cap.62, op.cit. For some of the cases where text-books have been accepted by the courts in proof of customary law, see: Amodu Tijani v. Secretary, Southern Provinces of Nigeria (1921) 3 N.L.R.56; [1921] 2 A.C. 399; Balogun v. Oshodi (1929) 10 N.L.R.36; Adeseye and ors. v. Taiwo and ors. (1956) I F.S.C.84; Suberu and ors. v. Sunmonu and ors. (1957) II F.S.C.33; Oyekan v. Adele 1957 I W.L.R. 876; also Adedibu v. Adewoyin (1951) 13 W.A.C.A.191; where, however, Ward Price's book, Land tenure in the Yoruba Provinces (1933), was rejected.
- 2 S.14 of the Evidence Act, cap.62, op.cit.; Angu v. Attah infra, footnote 1. For some of the authorities in which judicial notice has been taken of the rules of the customary law, see: Adagun v. Fagbola and anor. (1932) N.L.R.110. Buraimo and ors. v. Ghangboye and ors. (1940) 15 N.L.R.139; affirmed on appeal in 7 W.A.C.A. 69; Onisiwo and ors. v. Fagbenro and ors. (1954) 21 N.L.R.3; Cole v Akinyele and ors. (1960) V F.S.C.84; Ajobi and anor. v. Oloko and ors. [1959] L.L.R.152.

The principle governing the proof of customary law, which was established in Angu v. Attah<sup>1</sup> in 1916 by the Privy Council, has recently been reiterated by the Nigerian Supreme Court in the Lagos case of Giwa and ors. v. Erinmolokun<sup>2</sup>, where the appellants failed to discharge the burden of proof with respect to the rule of customary law upon which their action for a declaration of title to some land in Lagos had been based. Taylor, F.J., who delivered the judgement of the Supreme Court, said:

"It is a well established principle of law that native law and custom is a matter of evidence to be decided on the facts presented before the Court in each particular case, unless it is of such notoriety and has been frequently followed by the Courts that judicial notice would be taken of it without evidence required in proof." (3)

#### Western and Mid-Western Regions

As outlined in chapter one, there are customary courts in the Mid-Western Region which deal with the administration of estates governed by customary law. This is also the position in the Western Region.

#### Brief introduction to the organisation and jurisdiction of the customary courts

There are four grades of customary courts, namely: "A", "B", "C" and "D"; though there are plans to abolish

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1 (1916) P.C. (Gold Coast) 1874-1928, 43.

2 [1961] All N.L.R. 294.

3 Ibid, at p. 296.

the last grade of these courts.

The jurisdiction of each grade of court in causes and matters relevant to our discussion is set out in the second schedule<sup>1</sup> to the Customary Courts Law<sup>2</sup> as follows:

PART I - GRADE "A"

Unlimited jurisdiction in all civil causes and matters ..... Provided that the court shall not have jurisdiction to administer the estate of an intestate where the gross capital value thereof exceeds £500.

PART II - GRADE "B"

Unlimited jurisdiction in causes and matters relating to inheritance upon intestacy and the administration of intestate estates under customary law. Provided that the court shall not have jurisdiction to administer the estate of an intestate where the gross capital value thereof exceeds £500.

PART III - GRADE "C"

Jurisdiction in causes and matters relating to inheritance upon intestacy and the administration of intestate estates under customary law where the value of the property does not exceed fifty pounds.

PART IV - GRADE "D"

Jurisdiction in causes and matters relating to inheritance upon intestacy and the administration of intestate estates under customary law where the value of the property does not exceed twenty-five pounds.

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- 1 The Customary Courts (Amendment) Law, Western Region, No.34 of 1959; brought into force, with effect from 3rd September, 1959 by W.R.L.N. No 439 of 1959. It should be noted that W.R. No 34 of 1959 amended the second schedule to the Customary Courts Law, cap.31, Laws of the Western Region of Nigeria (1959), wherein the jurisdiction of grades "A" and "B" courts is stated to be unlimited.
  - 2 Cap.31, Laws of the Western Region of Nigeria, 1959.

Briefly summarised, the second schedule to the Customary Courts Law confers jurisdiction in these matters (administration and succession under customary law) on grades "A" and "B" customary courts where the gross value of the estate does not exceed £500; while in the case of grades "C" and "D", the value of the estate does not exceed £50 and £25 respectively.

Procedure adopted by the customary court in these suits

Nowhere in the provisions of the Customary Courts Law<sup>1</sup> or, indeed, in the Customary Courts Rules<sup>2</sup> is any guidance given as regards the practice and procedure to be followed by the customary courts in suits relating to the administration of estates under customary law. It must not, however, be assumed that these are formless suits from the procedural point of view. The position is that the courts have substantially assimilated the procedure in these suits to that observed in respect of other civil causes and matters - a fact clearly borne out by the certified true copies of proceedings relating to administration obtained by the present writer and appended to this work; together with the information

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1 Cap.31, Laws of the Western Region of Nigeria, 1959

2 The Customary Courts (Amendment, No.2) Rules, W.R.L. N.260 of 1959; amending the Customary Courts Rules (1958) contained in cap.31, op.cit., with effect from 1st August, 1959.

supplied by the clerks of court who certified such proceedings<sup>1</sup>. The procedure will now be briefly described.

The proceedings are usually initiated by the sole or principal beneficiary who files an ex parte application<sup>1</sup>; and where such a beneficiary is still young, some adult person acting for him, may make the application. In the Itsekiri case of In re Fregene<sup>2</sup>, decided by the Warri Divisional grade "B" customary court, three beneficiaries applied for a certificate of administration and inheritance. The first applicant was the sister of the deceased; the second was the deceased's second son, who appeared because the first son was of unsound mind; and the third was the dead man's nephew who, according to the record of the proceedings, had been included "to represent the interest of ... the half-brothers of the deceased"<sup>3</sup>. Sometimes, however, as where the question of the administration of the estate has been settled by the family, the application made is in respect of the actual inheritance of the estate. Thus, in the Urhobo case

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- 1 These proceedings relate to the following unreported cases: the Itsekiri case of Re Fregene, infra, and the Urhobo case of Re Omoko Ziregbe, infra.
  - 2 Suit No GBC/5E/60, unreported, decided on 4th June, 1960.
  - 3 Ibid, at p.1 of the copy of proceedings appended to this work.

involving the sum of £210, which the deceased had in his savings bank account, the suit was headed, "Court Inquiry: Re Certificate of inheritance to Estate of late Omoko Ziregbe"<sup>1</sup>. The evidence given by the deceased's eldest son left no doubt as to the fact that the process of administration had been completed; and that he was claiming the father's account at the bank by way of inheritance. He testified as follows:

"I am .... the eldest son of .....my late father has a saving Bank Account in the B.W.A. Ltd., Warri. I am here applying to the Court for a certificate of inheritance; as to enable me to recover the saving from the Bank, which I have already owned through the right of inheritance according to native law and custom, by the members of our family".(2)

Evidence required of the prospective customary administrator: proof of customary law in the customary court?

It will be recalled that the prospective customary administrator applying for the grant of administration in the High Court of Lagos must prove the particular customary law upon which he relies, unless the Court can take judicial notice of it. The question now to be considered is: does the principle requiring proof of customary law apply also in respect of proceedings before the customary court; or is such proof dispensed with before

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- 1 Suit No.2/61, unreported, decided by the Central Urhobo grade "B" customary court, Ughelli, on 28th August, 1961.
  - 2 Ibid. at p.1 of the copy of proceedings appended to this work.



this type of tribunal? The answer to this question is that the judicial authorities on the point are divided: there are the cases in which it has been held that, unless it can be judicially noticed, customary law must be formally proved in the customary court; and there are others in which it has been decided that evidence of customary law is not required, where the members of the customary court hearing the case are familiar with the particular custom. We will now examine these decided cases.

(a) Customary law must be proved

The decision in Fijabi v. Odumola<sup>1</sup>, decided by the High Court of the former Western Region, is to the effect that a party relying upon customary law in proceedings before the customary court must adduce evidence in support of it, unless the courts are bound to take judicial notice of it. In this case, the appellant obtained judgement against the respondent in the then Ojo'ba II native court, Ibadan, in respect of a debt owed by the latter. The respondent appealed to the native court of appeal, which allowed the appeal on a proposition of customary law not given in evidence before either of the customary tribunals; but which

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1 [1955-6] W.N.L.R.133.

was stated in the judgement of the native court of appeal. On appeal to the High Court on the ground that there had been no proof of the customary law, Taylor, J., as he then was, allowed the appeal, saying:

"It is true that in a case emanating from the Native Courts there are no pleadings ordered, but the absence of this does not in any way relieve a party from leading evidence as to such law and custom." (1)

Similarly, in Edokpolor v. Idehen<sup>2</sup>, also a decision of the High Court of the former Western Region, Thomas, J., as he then was, allowed an appeal from the decision of the Benin grade "A" customary court on the ground that the lower court had given judgement against the appellant in respect of trespass to the respondent's land, without receiving (and, in fact, rejecting) evidence of the Benin customary land law.

The case - Edokpolor v. Idehen<sup>2</sup> - is rather interesting as regards the view expressed by the president of the customary court on the question of proof of customary law in proceedings before the customary court. In answer to the request by counsel for the respondent that evidence of the customary law be led, the president remarked that his court was the repository of the

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1 [1955-6] W.N.L.R.133.

2 [1961] W.N.L.R.11.

customary law and, as such, he required no proof of that system of law; which was to be proved only before the High Court. He even went further to draw the analogy with English law which, he pointed out, was not required to be proved in an English court. Perhaps, his view on this point will be more vividly brought out by quoting his actual words which run:

"This is a Customary Court and the court is the repository of Customary Law. If on appeal issues of customary law are raised and the High Court is in difficulty it can require the aid of assessors. Just as evidence of English law is not required in English Court so there is no need for evidence ..... as to the existence or non-existence of Customary Law in Customary Courts of the Western Region." (1)

As stated above, the president of the customary court was reversed on appeal on precisely this point.

The consideration which weighed most with the learned Judge, as he then was, who decided the case of Edokpolor v. Idehen<sup>2</sup> was that the president of the grade "A" court was not a member of a customary institution, administering purely customary law. In the learned Judge's words:

"I have noted that the learned President holds the view that as President of the Benin Customary Court Grade "A", he is the repository of customary law. That might be so had he been the President of a court accepted as

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1 Edokpolor v. Idehen [1961] W.N.L.R.11, at p.13.

2 [1961] W.N.L.R.11.

wholly native in its constitution and concept, and administering the law and custom of such native institution. He is a President administering the law as envisaged by the Customary Courts Law, 1957, and on a proper construction of the statute, evidence of the customary law appropriate to the area should have been led...." (1)

A similar observation was made by the learned Judge, who decided the case of Iyamuse Ehigie v. Gregory Ehigie<sup>2</sup>, which will shortly ~~be examined.~~ Iyamuse Ehigie v. Gregory

(b) Evidence of customary law need not be given if members of the customary court are familiar with the particular customary law

On the other hand, there are cases in which it has been held that evidence of customary law need not be led, if the members constituting the customary court deciding the case know the customary law in issue.

We may start with the Ghana (Gold Coast) case of Ababio II v. Nsemfoo<sup>3</sup>, where the appellant, in execution of a judgement for a declaration of title to some land he had obtained, ejected the respondent and other persons from the land in breach of the customary law; which only permitted him to compel them to enter into tenancy agreements with him. The respondent brought an action against the appellant in the Asantehene's "A" court (the para-

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1 Ibid., at p.14.

2 [1961] All N.L.R.842; [1961] W.N.L.R.307.

3 (1947) 12 W.A.C.A.127.

mount ruler's customary court), claiming recovery of possession or, in the alternative, damages for wrongful dispossession. Notwithstanding that there was no evidence of the relevant customary law before the Asantehene's "A" court, the tribunal stated that law in its judgement; and ordered that the appellant should restore possession to the respondent, and enter into a tenancy agreement with his adversary.

The appellant appealed to the Chief Commissioner's Court, which dismissed the appeal, holding that the court below was expert on customary law. He then appealed to the West African Court of Appeal which affirmed the decisions of both lower courts. The Court took the view that, notwithstanding the absence of evidence before the Asantehene's "A" court with respect to the existence of the rule of the customary law on which the customary tribunal had based its decision, the decision of the court must still be affirmed on the ground that the members of the court were familiar with the particular rule of the customary law, which they stated (without evidence being led as to its existence) in the judgement. As regards the principle laid down in Angu v. Attah, which requires evidence of customary law to be

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1 (1916) P.C. (Gold Coast) 1874-1928, 43.

adduced where the courts are unable to take judicial notice of it, the Court held that it must be confined to proceedings before non-customary tribunals; and that there was no ground for extending it to customary courts, at any rate, where "the members are versed in their own native customary law...." <sup>1</sup> In the words of M'Carthy, J., who delivered the judgement of the Court:

This [i.e. the principle in Angu v. Attah], of course, was intended to apply to what may be described as British Courts before which it is sought to prove a particular custom. There is no ground for extending its application to Native Courts of which the members are versed in their own native customary law.....If the members of a Native Court are familiar with a custom it is certainly not obligatory upon it to require the custom to be proved through witnesses" (1)

It should be observed that the portion of the judgement in Ababio II v. Nsemfoo<sup>2</sup> to the effect that proof of customary law is to be dispensed with in proceedings before customary courts of which the members are versed in that system of law, is preceded by the phrase per incuriam<sup>2</sup>; and that it has been held in the recent Benin case of Iyamuse Ehigie v. Gregory Ehigie<sup>3</sup>, where the view has also been expressed that the decision in Ababio's case was given per incuriam and was not intended to be of general application<sup>4</sup>, that customary law must be established by evidence -

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1 Ibid, at p.128.

2 (1947) 12 W.A.C.A.127.

3 [1961] All N.L.R.842; [1961] W.N.L.R.307.

4 Ibid, at p.848; and at p.311 respectively.

unless it can be judicially taken notice of - in all cases where the membership of a customary tribunal has not been constituted on considerations of expertise in, or familiarity with, customary law. In Ehigie's case<sup>1</sup>, the dispute was concerned with a house left by a deceased Bini, who died intestate. The eldest son of the deceased, the respondent, claimed the property as the deceased father's heir under the Benin customary law of succession; while the appellant - the eldest daughter of the deceased - contended that the house had been specially built for, and given to, her by the deceased. The proceedings were commenced in the grade "A" customary court, Benin, where the respondent sought to obtain a declaration of title to the property which was occupied by the appellant.

It will be recalled that the view of the president of the Benin grade "A" customary court, as expressed in the earlier case of Edokpolor v. Idehen<sup>2</sup>, was that it was not necessary to lead evidence of customary law in proceedings before a customary court, since that court was the repository of this system of law. Accordingly, in Ehigie's case<sup>1</sup>, the learned president dispensed with evidence of the Benin customary law of succession, which he, however,

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1 [1961] All N.L.R.842; [1961] W.N.L.R.307.

2 [1961] W.N.L.R.11.

embodied in the judgement he gave in favour of the respondent. The deceased's eldest daughter appealed to the High Court, which allowed the appeal. The ground on which the decision of the customary court was reversed was that the president thereof, being a person appointed solely on considerations of his legal qualifications, erred in law in stating the Benin customary law in his judgement in the absence of any evidence adduced before the court. As regards the qualifications required of such a president under the provisions of the Customary Courts Law, Fatayi-Williams, J., observed:

"Although he is required to apply the customary law of the area of jurisdiction of the court the President is not required by statute either to be a native of the area of jurisdiction of the customary court or to have any special qualification in the customary law of the area. The only statutory qualification is that he should be a legal practitioner".(1)

For this reason, the decision in Ababio's case - to the effect that customary law need not be proved where the members of the customary tribunal are familiar with it - was held to be inapplicable, since the members of the Asantehene's "A" court were "for obvious reasons, ... familiar with their own native customary law"<sup>1</sup>; while the same thing could not be said of the Benin grade "A"

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1 Ibid, at p.848; and at p.311 respectively. This statutory requirement is contained in section 6(1) of the Customary Courts Law, cap.31, Laws of the Western Region of Nigeria (1959).



customary court, the president of which is appointed strictly on the basis of his legal qualifications.

Some comments on the judicial authorities on proof of customary law in proceedings before customary courts

In his book entitled, the Sources of Nigerian law, Park advances the view that customary law need not be established by evidence in proceedings before the customary courts, partly because the provisions of the Evidence Act do not in general apply to these courts; and partly because the members of these courts, whether possessing legal qualifications or not, are usually acquainted with this system of law, by reason of their belonging to the areas of jurisdiction of the courts<sup>1</sup>. While the present writer's experience of the position in the Mid-Western Region lends support to the learned author's assertion regarding the membership of the local communities of the judges of these courts (Obaseki, the president of the Benin grade "A" customary court, who decided Edokpolor v. Idehen<sup>2</sup> and Iyamuse Ehigie v. Ehigie<sup>3</sup> being a Bini)<sup>4</sup>, it is nevertheless to be noted that the learned author's view is in direct conflict with the two decisions<sup>5</sup> of the High

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1. At p.90.

2. Edokpolor v. Idehen [1961] W.N.L.R.11.

3. [1961] All N.L.R.842; [1961] W.N.L.R.307.

4. He is, however, now a Judge of the High Court of the Mid-Western Region. See: M. N. Notice No.80 of 1964, 2nd April, 1964.

5. I.e., Edokpolor v. Idehen; and Ehigie's case; op.cit.

Court of the former Western Region already discussed.

As already noted, the decision in the earlier<sup>1</sup> of these two cases was to the effect that customary law, unless this can be judicially noticed, must be proved in proceedings before the customary court, on the ground that the customary court is not a court accepted as wholly native in its constitution, and administration of the customary law; but rather as a court established by the Customary Courts Law, the provisions of which empower the court to administer not only the customary law, but also the general law.

As regards the decision in the later case - Iyamuse Ehigie v. Gregory Ehigie<sup>2</sup> - the view expressed by the learned judge seems, however, to be that the considerations governing the appointment of the members of a particular court are to be taken into account in deciding whether to insist upon or dispense with proof of customary law in proceedings before this type of court.

It will be recalled that Park's submission is to the effect that the requirement of formal proof should always be dispensed with in this connection. In point of fact, he has criticised the decision of Taylor, J., as

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1 Edokpolor v. Idehen [1961] W.N.L.R.11.

2 [1961] All N.L.R. 842; [1961] W.N.L.R.307.

he then was, in Fijabi v. Odumola<sup>1</sup> on two grounds: that the attention of the learned judge had not been drawn to the Ghana case of Ababio II v. Nsemfoo<sup>2</sup>; and that, in any case, proof of customary law in proceedings before customary courts was impracticable and unnecessary<sup>3</sup>. Notwithstanding the learned author's submission and criticism, or the cleavage of judicial opinion on the point, it is respectfully submitted that some evidence of the customary law should always be required of a party relying on a rule of this system of law in proceedings before the customary court. Firstly, this will put the appeal court in a better position to appreciate and evaluate the customary law rule in issue. Secondly, it will help to check possible abuse on the part of customary court judges, whose statement of the law (without evidence) may represent a subjective - often sympathetic - view, based upon their own personal knowledge of the facts of the matter before them.

It is, perhaps, worth noting that the case of Ababio II v. Nsemfoo<sup>2</sup>, where it was held that customary law was not to be proved if the members of the court deciding a case were familiar with the custom, contains some cryptic reference to the advisability of leading

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1 [1955-6] W.N.L.R.133.

2 (1947) 12 W.A.C.A.127.

3 Park, The sources of Nigerian law (1963) p.91.

evidence of customary law in proceedings before a customary tribunal. For, M'Carthy, J., delivering the judgement of the Court, observed:

"There is no ground for extending its application to Native Courts of which the members are versed in their own native customary law, although there is nothing to prevent a party from calling witnesses to prove an alleged custom." (1)

Nature of evidence, in fact, required of the prospective customary administrator in respect of his application before the customary court.

The proceedings leading to the appointment of the administrator by the customary court take the form of an inquiry, at which he and his witnesses, if any, give evidence; and are subjected to cross-examination by the court.

The evidence required of him covers certain facts, chief among which include: the time and place of death of the deceased; his last place of abode; his occupation or occupations; the number of persons, such as children and other relatives, beneficially interested in the deceased's estate; and the degree of relationship the applicant has with the deceased. In the Itsekiri case of In re Fregene<sup>2</sup>, two of the three applicants gave evidence establishing the facts indicated above. Only one of the applicants was, however, cross-examined by the court. The

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1 Ibid, at p.128, underlined for emphasis.

2 Suit No. GBC/5E/60, unreported, of 4th June, 1960; grade "B" court, Warri.

applicants called no witnesses to testify in support of their claim; nor, indeed, in proof of the Itsekiri customary law upon which they relied. One of the applicants merely said in evidence:

"The deceased had no brother living and I am the only surviving elder sister. I want this Court to grant the second son, his nephew .... and me a certificate of inheritance to enable us not only to inherit but also to administer the estate of my deceased brother according to Itsekiri customary law". (1)

The other applicant testified in support of the evidence given by the first as to their inheritance rights under the Itsekiri customary law in this way:

"....I would like the Court to consider the point in relation to the interest of the beneficiaries of the estate and give its decision according to the best principles of customary law". (2)

Could this evidence adduced by the applicants be regarded as proving the Itsekiri customary law of succession? The answer must clearly be in the negative. Nevertheless, the customary court considered that the applicants had made out a case entitling them to the grant of a certificate with respect to the administration and inheritance of the estate. The ruling of the court was as follows:

"Having heard the evidence of the first and second applicants, I am satisfied that the three applicants before me are, having regard to the interest of the beneficiaries of the estate of the deceased,..... and of the Fregene family under Itsekiri customary law entitled to inherit and administer the estate of the deceased. I, therefore, order that the Certificate of Inheritance do issue to them accordingly." (2)

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1 Suit No.GBC/5E/60, unreported, of 4th June, 1960; grade "B" court, Warri.

2 Ibid, at p.2 of the copy of proceedings.

In the Urhobo case of In the Estate of Omoko Ziregbe<sup>1</sup>, the eldest son of the deceased applied for a certificate of inheritance in respect of his father's money left in a savings bank account. He gave evidence and also called the deceased's brother in support of his case. Both were cross-examined by the court. As in the Itsekiri case of In re Fregene<sup>2</sup>, however, there was no evidence directed at establishing the Urhobo customary law of succession. This did not, however, affect his chances of success: the court granted his application.

The informality observed in proceedings before the customary courts.

Both the Itsekiri and the Urhobo cases - In re Fregene<sup>2</sup> and In the Estate of Omoko Ziregbe<sup>1</sup> respectively - discussed above, plainly show that suits relating to the appointment of the customary administrator, including the grant of the certificate of inheritance, are characterised with little or no formality at all. This is not surprising. As has been seen, the process of administration and the actual distribution of the estate under customary law are matters for the members of the family of the deceased.

In the Urhobo case of In the Estate of Omoko Ziregbe<sup>1</sup>

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1 Op.cit.

2 Op.cit.

the applicant's witness (a full brother of the deceased) made it clear to the court that the family of the deceased had completed both the administration and distribution of the dead man's estate; but that they had come before the court to obtain a certificate or authority to enable the applicant (the deceased's eldest son) to claim the deceased's savings bank account. He testified:

"I am the direct brother of the late Chief Omoko Ziregbe ... we the members of our family have administered the saving account of the late father now in the B.W.A. Ltd. [i.e. the Bank of West Africa Ltd.], Warri, and wish that a certificate of inheritance be given to him [i.e. the applicant, referred to as 'complainant' by the court, however] to enable him to recover the said money." (1)

As stated, the applicant was successful, the court making an order which read: "Application is hereby granted." <sup>2</sup>

Procedure where the appointment of the administrator is opposed

Anyone opposed to the grant to the administrator of the certificate or authority entitling him to administer the estate may file an application specifying the grounds for opposing such grant. He is entitled to be heard by the customary court, which will, however, require him to put on notice the party he seeks to oppose. The requirement enables the party sought to be opposed to file a

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1 Ibid, at p.1 of the copy of proceedings appended.

2 Ibid, at p.2.

counter-application to his opponent's application; and generally affords him (the party sought to be opposed) the opportunity to resist more effectively his adversary's case.

In the Itsekiri case of In re Fregene<sup>1</sup>, an application was filed, some four months after the appointment of the administrators and administratrix, in which it was sought to remove the persons appointed by the court. The court rejected this application on the ground that it "can see nothing in the affidavit of the applicants to justify the removal sought"<sup>2</sup>.

Similarly, in the Yoruba case of Idowu and anor. v. Adisa and anor.<sup>3</sup> the native court rejected the application opposing the appointment of the respondents as the persons entitled to administer the estate.

Order made by the customary court on termination of proceedings wherein the customary administrator is appointed

As has been seen from the cases decided by the customary courts, the order by which the customary administrator is appointed is designated as a 'certificate'. It is also termed a 'judgement' sometimes.<sup>4</sup> In the Superior Courts, however, this certificate or judgement of the

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1 Op.cit.

2 Op.cit., at p.2 of the copy of the proceedings appended

3 [1957] W.N.L.R. 167.

4 See over.



customary court is variously referred to as 'authority'<sup>1</sup>, 'appointment'<sup>2</sup>, 'power' or 'grant' (but in this last instance, without the additional words "of letters of administration")<sup>3</sup>. In the only known case - Idowu and anor. v. Adisa and anor.<sup>4</sup> in which the term 'letters of administration' was employed by the High Court of the Western Region, Ademola, C.J., as he then was, cautiously put the words (letters of administration) in quotation marks.

As will be shown later, one effect of the rather cautious terms employed by the Superior Courts in designating the order of the customary court has been to differentiate the limited powers of the customary administrator appointed thereby from those possessed by his counterpart under the general law; who, as has been seen, is granted letters of administration.

#### Appointment by court (continued)

#### The position in the Eastern Region

#### The customary courts

There are only two grades of customary courts in

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- 4 See: Suit No.1084/59 (unreported), decided by the Obia grade "A" customary court, in Ahoada Division, Port Harcourt, Eastern Region, on the 10th September, 1959. Also: Lawal and ors. v. Younan and ors. [1961] All N.L.R. 245 at p.252; [1961] W.N.L.R.197 at p.202.
- 1 Lawal and ors. v. Younan and ors. [1959] W.N.L.R.155 at p.158.
- 2 Aragba and ors. v. Akanji and ors. [1960] W.N.L.R.92
- 3 Lawal's case [1961] All N.L.R.245 at pp.252-3; 1961 W.N.L.R. 197 at pp.202-3.
- 4 [1957] W.N.L.R.167.

the Eastern Region namely: the grade "A" district customary courts; and the grade "B" district customary courts.

The jurisdiction of these courts in causes and matters relating to succession is set out as follows:

District Grade "A"

Causes and matters relating to the succession to property and administration of estates under customary law where the value of the property does not exceed one hundred pounds. (1)

District Grade "B"

Causes and matters relating to succession to property and administration of estates under customary law where the value of the property does not exceed twenty-five pounds. (2)

In short, grades "A" and "B" customary courts in the Eastern Region exercise jurisdiction in the causes and matters referred to above, where the value of the property does not exceed £100 and £25 respectively.

Procedure

Much of what has been described in connection with proceedings before the customary courts of the other two Regions applies to the Eastern Region; except that the prospective administrator appears as plaintiff, while one or more members of the deceased's family defend in

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1 The Customary Courts (Amendment) Law, E.R. No.12 of 1957.  
2 First schedule to the Customary Courts Law, No.21 of 1956.

the proceedings. Thus, in the case of Ephraim Ochonma v. Vincent Ochonma<sup>1</sup>, heard before the Obia grade "A" customary court in Port Harcourt Province, the prospective administrator sued his elder half-brother and head of the family. The relief sought was a declaration that the plaintiff was the next-of-kin of the deceased, entitled to the "salary, gratuity, pension, if any"<sup>2</sup>, from the government department (P.W.D. or Ministry of Works) which employed the deceased.

As in the customary courts of the Mid-Western Region, the proceedings before the customary court in the Eastern Region are treated as matters occasioning little formality. In the Ochonma's case<sup>1</sup>, for instance, the defendant, far from resisting the claim, admitted the whole case presented by the plaintiff; though, surprisingly enough, the customary court still subjected him to the ordeal of cross-examination.

But this attempt on the part of the court to give the semblance of a contested case to the proceedings apparently does not have the effect of rendering the procedure irregular. For, it has been held in the Yoruba case of Oladapo v. Akinsowon<sup>3</sup> that we should view the proceedings before a customary court as men of commonsense, and not

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1 Suit No.1084/59, op.cit.

2 Ibid., at p.1 of the copy of proceedings appended.

3 [1957] W.N.L.R.215.

"as English lawyers applying the English rules of evidence, procedure and substantive law...." (1)

AUTHORITY GRANTED TO THE CUSTOMARY ADMINISTRATOR BY THE  
CUSTOMARY COURT: LEGAL POSITION OF

There is no doubt that the order of the customary court appointing the customary administrator empowers him to administer the estate to which it (order) relates. This means, of course, that such an order is effective only in respect of an estate governed by customary law. It cannot, for instance, be invoked in respect of claims arising under the general law or, at any rate, where the claim is one regulated by an English statute applying to Nigeria as a statute of general application.

In Lawal and ors. v. Younan and ors.<sup>2</sup>, the High Court of Western Nigeria held that customary administrators appointed by a customary court were entitled to sue for damages on behalf of the wives and children of two deceased persons, under the provisions of the English Fatal Accidents Acts<sup>3</sup>. On appeal to the Supreme Court<sup>4</sup>, however, this

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1 Ibid., at p.216. In the lower court (the old native court), a member said: "This Court is a Native Court and not a Law Court"; ibid., at p.215.

2 [1959] W.N.L.R.155.

3 (1846), 9 & 10 Vict. c.93; and (1864), 27 & 28 Vict. c.95.

4 Reported in [1961] All N.L.R.245; [1961] W.N.L.R.197.

decision was reversed on the ground that the customary administrators had no capacity to sue under the provisions of the English law governing the rights of the dependants of both deceased persons. The position would have been different had customary law governed the claim or had the dependants themselves brought the action. Ademola, C.J.F. delivering the main judgement of the Court, observed:

"On the view I have taken of this matter, it is clear that a person to whom power is given under Customary Law to administer the Estate of a deceased person is a person empowered where the Customary Law can be invoked, and such a power cannot be extended to matters which are statutory rights under English law and to which statutory remedies apply .... I have therefore come to the conclusion that the two actions in the High Court could not be prosecuted by the plaintiffs [i.e. the customary administrators] as they have no capacity to sue. The dependants of the deceased persons themselves could have sued on their own behalf." (1)

Lawal and ors. v. Younan and ors. also supportable on additional ground: original jurisdiction of the High Court excluded in any matter "subject to the jurisdiction of a customary court relating to... inheritance or disposition of property on death"

We may repeat what has been stated in chapter one to the effect that the original jurisdiction of the High Courts of both the Western and the Mid-Western Regions is excluded in matters, which are subject to the jurisdiction

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1 Ibid, at p.253; and at p.203 respectively.

of a customary court, relating to inheritance or disposition of property on death<sup>1</sup>; and add that this is also the position in the Eastern Region<sup>2</sup>. In addition, there are the Yoruba cases of Igboodu and ors. v. Amoo<sup>3</sup> as well as Aragba and ors. v. Akanji and ors.<sup>4</sup> in which the High Court of the Western Region declined to exercise original jurisdiction on the ground that the suits, being concerned with inheritance under customary law, were subject to the jurisdiction of the then native courts; which had appointed as customary administrators, the plaintiffs and the defendants in the first and second cases respectively.

It follows from the statutory provisions and the decided cases referred to above, that the decision in Lawal's case<sup>5</sup>, in which the Supreme Court held that the customary administrators lacked the capacity to sue in the High Court of Western Nigeria, is clearly supportable on an additional ground. It is, therefore, rather surprising that this point - that the matter being one subject to

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1 The High Court Law, cap.44, s.9(1), Laws of the Western Region of Nigeria, 1959.

2 The High Court Law, Eastern Region, No.27 of 1955, s.13.

3 [1957] W.N.L.R.22.

4 [1960] W.N.L.R.92.

5 Op.cit.

the jurisdiction of a customary court which had appointed the administrators of both estates, the original jurisdiction of the High Court was thereby excluded - was not taken in the Court below. This is all the more surprising when it is realised that there was evidence with regard to the appointment of the customary administrators by the customary court, from which the learned trial Judge was, no doubt, able to say:

"... the test is whether an authority given to the plaintiffs [i.e. the customary administrators] by the Customary Courts to administer the estate of the deceased persons entitles them to sue in the High Court as such administrators. I can see no objection in law to prevent them from doing so, for, although the basis of the claim is under English law, it is by virtue of their right as customary administrators of the deceased's estate and on behalf of the customary dependants that they have instituted these proceedings." (1)

As indicated above, the decision of the learned trial Judge was reversed on appeal.

Notwithstanding the existence of the provisions of the High Court Laws and of the judicial authorities regarding the exclusion of the original jurisdiction of the High Courts in matters pertaining to inheritance, which are subject to the jurisdiction of a customary court, it is still arguable, as has been observed in chapter one, that instances may exist in which the High Court may be justified in exercising original jurisdiction in respect of

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1 Lawal's case [1959] W.N.L.R.155 at pp.158-9 - High Court of the Western Region.

matters relating to succession governed by customary law. These instances will include cases in which the value of the estate governed by customay law exceeds the jurisdiction of the appropriate customary court or courts; and where the estate devolving in accordance with customary law is situated in an area having no customary court. In respect of the situations instanced above, it is submitted that the original jurisdiction of the High Court cannot be excluded; in the first case, it is clearly not open to argument to say that the matter is one "subject to the jurisdiction of a customary court", when that court is incompetent in law to assume jurisdiction; in the second, there simply is no customary court to whose jurisdiction the matter is or may be subject.

#### THE ORIGINAL JURISDICTION OF MAGISTRATES' COURTS IN THESE MATTERS

As regards the original jurisdiction of the Magistrates' Courts in these matters, it is interesting to observe that the operative phrase - "subject to the jurisdiction of a customary " - which was contained in the provisions of the old Magistrates' Courts (Western Region)



Law<sup>1</sup> (but which, as has been seen, is still retained in the High Court Laws at present in force in the Western, Mid-Western and Eastern Regions, as well as in the existing Magistrates' Courts Law of the last Region<sup>2</sup>) is now omitted from the provisions of the Magistrates' Courts Law applicable in the Western and Mid-Western Regions.

The existing provisions of the Magistrates' Courts Law excluding the original jurisdiction of these courts in respect of matters relating to succession under customary law now read:

"...causes or matters relating to inheritance upon intestacy under customary law and the administration of intestate estate under customary law" (3).

But though the exclusion of the original jurisdiction of magistrates' courts does not depend upon the matter being subject to the jurisdiction of a customary court, as in the case of the relevant provisions of the High Court Laws,

- 1 No.5 of 1955, s.18; see also the case of Idowu and anor. v. Adisa and anor. [1957] W.N.L.R.167 at p.168, in which Ademola, C.J., held that the provisions excluded the original jurisdiction of the magistrate's court in these matters. Cf. the case of Briggs v. Briggs (1957) II E.N.L.R.6, where the High Court of the Eastern Region held that these provisions excluded the original jurisdiction of the magistrate's court in a suit concerning the determination of family status (legitimacy) under customary law.
- 2 The Magistrates' Courts Law, Eastern Region, No.10 of 1955 s.17.
- 3 Cap.74, ss.19(4) and 20 (d), Laws of the Western Region of Nigeria, 1959.

it is possible to take the view that these provisions cover only cases relating to intestate succession governed by customary law; and that a magistrate's court is not thereby precluded from exercising original jurisdiction in matters governed by the customary law relating to wills (oral or nuncupative wills) and gifts inter vivos. By way of contrast, we may note the position under the general law, in respect of which the court is prohibited from exercising any jurisdiction whatsoever, whether the matter involves testate<sup>1</sup> or intestate<sup>2</sup> succession. However, barring undefended suits, cases involving disputed succession to land or any interest therein under customary or any other law fall outside those matters, in respect of which the magistrate's court may exercise original jurisdiction.<sup>3</sup>

#### VESTING OF THE ESTATE

It will have been observed in chapter two, dealing with the administration of estates under the general law, that, that law being based on the relevant English law, the intestate's estate vests in the 'President'<sup>4</sup> of the

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1 Ibid, ss.19(4) and 20(b).

2 See: Administration of Estates Law, cap.1, s.2(1), ibid; the Administrator-General's Law, cap.2, s.2, ibid.

3 Cap.74, ss.19(4) and 20(a), ibid.

4 See: the High Court Law, Eastern Region, No.27 of 1955, s.8(1) where this term is used in referring to the Chief Justice.

High Court during the interval between the death and the grant of administration. In England, where the High Court of Justice is formally arranged in Divisions, the intermediate vesting of the intestate's estate is in the President of the Probate, Divorce and Admiralty Division<sup>1</sup>; while in Nigeria, where such formal organisation of the Court does not exist, the intestate's estate vests in the Chief Justice of the jurisdiction concerned, who is the principal Judge or 'President'<sup>2</sup> of the Court. In both the Western and Mid-Western Regions, there are provisions of the general law expressly vesting the intestate's estate in the Chief Justice "from the date of... death until administration is granted"<sup>3</sup>. As regards the position in Lagos and the Eastern Region, however, such vesting of the intestate's estate in the Chief Justice of the legal unit arises by the implication contained in the relevant provisions of the High Court of Lagos Act and the High Court Law of the Eastern Region, reproduced in an earlier part of this work; by virtue of which the probate

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1 See: the Administration of Estates Act (1925), (15 Geo.5, c.23), ss.55(1)(XV) and 9.

2 See: the High Court Law, Eastern Region, No.27 of 1955, s.8(1) where this term is used in referring to the Chief Justice.

3 The Administration of Estates Law, Western Region, cap.1, s.10, ibid.

jurisdiction of these Courts is to be exercised in conformity with the current English law and practice<sup>1</sup>.

What then is the legal position regarding the intermediate vesting of the intestate's estate under customary law? In the words of a learned writer:

"The theoretical question is thus posed - do the rights of the deceased pass automatically to his heirs at his death, or are they temporarily vested in those who administer the estate?" (2).

In the opinion of the learned writer, the estate vests in the administrators on the ground that they have the powers of sale in respect of the dead man's property, including the rights to settle his debts and funeral expenses<sup>2</sup>.

As regards the opinion expressed by the writer regarding the intermediate vesting of the estate in the customary administrator, however, it should be borne in mind that he is by discipline bound to see the question from a different angle; writing, as he says, "as an anthropologist and not as a lawyer"<sup>3</sup>. Now, the rule that

1 See: the High Court of Lagos Act, cap.80,s.16, Laws of the Federation of Nigeria and Lagos, (1958); the High Court Law, Eastern Region, No. 27 of 1955,s.16.

2 Lloyd, Yoruba land law (1962) p.287.

3 Lloyd, op.cit. p.8; cf. Lloyd, "Some notes on the Yoruba rules of succession..", [1959] J.A.L.7 at p.8; Lloyd, "Family property among the Yoruba", [1959] J.A.L.105.

has emerged from the decided cases on the point is that there is no such thing as the intermediate vesting of an intestate estate governed by the customary law and that the property of a deceased intestate vests automatically in his heirs as family property<sup>1</sup>. It seems, however, significant that the same writer has stated elsewhere the rule established by the judicial authorities, for he says:

"A prevalent view is that, when a man dies, his self-acquired property immediately becomes 'family property'"<sup>2</sup>.

In this regard, we may note the correct, clear and precise statement of the relevant rule of the customary law contained in the works of two learned legal textbook writers. Coker, writing on the institution of family property among his people, the Yoruba, sums up the rule of the Yoruba customary law in this way:

"... whenever any Yorubaman dies intestate, his ... property

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1 For some of these cases, see: Ogunmefun v. Ogunmefun and ors. (1931) 10 N.L.R.82, and the authorities considered therein; Jenmi v. Balogun (1936) 13 N.L.R.53; Flynn and ors. v. Gardiner (1953) 14 W.A.C.A.260; Edun v. Koledoye and ors. (1954) 14 W.A.C.A.642; cf. Taylor v. Williams and anor. (1935) 12 N.L.R.67.

2 Lloyd, [1959] J.A.L.7 at p.29.

becomes... family property.... The interests of the... members of the family, who become the owners, vests in possession forthwith.(1)"

Concerning the relevant rule of the Akan customary law, Professor Allott writes:

"By Akan law, when a man(or woman) dies intestate, all his property... vests automatically in his matrilineal family.....(2)"

## THE RIGHTS, DUTIES, POWERS AND LIABILITIES OF THE CUSTOMARY ADMINISTRATOR

### DUTIES AND POWERS OF THE ADMINISTRATOR

The duties and powers of the customary administrator are discussed before consideration of his rights and liabilities, since, as we shall see, the latter topics depend upon the manner in which he has performed his duties, and exercised his powers in the discharge of his obligations.

The main duties of the administrator include the following, that is to say:

- (1) arrangement of the burial and funeral of the deceased;
- (2) getting in the estate of the deceased;
- (3) management of the estate;

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1 Coker, Family property among the Yorubas (1958), pp.43-4 and 52.

2 Allott, "Marriage and internal conflict of laws in Ghana" [1958] J.A.L.164, at p.179; Allott, Essays in African law (1960) p.239.

- (4) maintenance of the wives, children and other dependants of the dead man;
- (5) giving account of his administration.

(1) Arrangement of the burial and funeral of the deceased

The reader is referred to the account given in chapter five in connection with the performance of the burial and funeral rites of the deceased; including the link between participation in the performance of these rites and the inheritance of the property left by the dead man.

It is sufficient here to state briefly that it is the duty of the administrator to arrange and supervise the burial and funeral of the deceased; and to exercise his powers of exacting from the latter's relatives their contributions towards the expenses involved in carrying out the mortuary rites.

(2) Getting in the estate of the deceased

The administrator assumes control of the property of the deceased, satisfying claims made by the creditors of the estate and collecting debts owing to the deceased where these are due for repayment.

(a) Payment of debts owed by the deceased

Under the traditional system, the administrator had to invite the deceased's creditors to state their claims punctually, usually before the debtor was actually interred; or, where this was not possible - as where the creditor was unaware of his debtor's death - as soon as possible after the performance of the final rites.<sup>1</sup> This is not to say that a claim not advanced in time was, in general, not honoured, since lapse of time does not extinguish a debt under customary law<sup>2</sup>. It did, however, mean that stale claims were often suspect, and might entail some hard oath-taking on the part of creditors before they were satisfied<sup>2</sup>.

It is necessary to point out that it is now a criminal offence to employ the traditional method of proving a debt by means of oath or swearing<sup>3</sup>. A creditor

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1 See: Thomas, Anthropological report on Ibo-speaking peoples, (1914), pt.IV, pp.164-5; Obi, The Ibo law of property (1963) p.151; Ajisafe, The laws and customs of the Yoruba people (1924) p.82; Egharevba, Benin law and custom (1949), p.74.

2 Thomas, (1914) pt.IV, p.164; Thomas, Anthropological report on the Edo-speaking peoples (1910), pt.1, p.98; Basden, Among the Ibos (1921) p.85; Basden, Niger Ibos (1938), p.268; Ajisafe, op.cit. p.87; Omoneukanrin, Itsekiri law and custom (1942) p.114; cf. the Limitation Law, Western Region, cap.64, s.1(2) - Laws of the Western Region of Nigeria, 1959 - where statutory recognition is accorded to this rule of customary law in matters relating to inheritance, among several other things.

3 See: The Criminal Code, cap.28, ss.145-8, Laws of the Western Region of Nigeria (1959); The Criminal Code(Lagos), cap.42, ss.207-210, Laws of the Federation of Nigeria and Lagos, (1958).



of the deceased is clearly entitled to decline having to take oath before being paid; and may instead institute proceedings in a court of law with a view to enforcing repayment.

The debts owed by the deceased are paid from his estate; unless, as we shall see later, the administrator is also the only beneficiary or principal beneficiary of the estate, when his liability in this regard is not limited to the value of the property he has inherited. It must, however, be repeated that only those debts due during the period of administration are paid by the administrator. The repayment of debts falling due for payment after this period are, as will be shown, the responsibility of the beneficiary or chief beneficiary of the estate.

(b) Collection of debts due to the deceased

As part of his duty of getting in the estate, the administrator is responsible for the collection of all debts owing to the deceased and due for repayment, except those which had been assigned or waived by the latter during his lifetime<sup>1</sup>.

Collection of the debts due to the deceased starts soon after his death. This is because, as will have

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1 Obi, op.cit. , p.151.

been apparent, the proceeds of such debts may be required in connection with the performance of his burial and funeral rites; and, as will be clearer later, for the maintenance of his dependants during the period of administration.

(3) Management of the estate of the deceased

In the course of his duty of managing the estate, the administrator is concerned with exercising control over the property of the deceased; including the reaping and subsequent storing of any crops planted by the latter, which are ripe. In short, his duty in this connection is to take charge of the deceased's property as manager, caretaker or custodian pending the distribution thereof<sup>1</sup>.

However, he has power to sell, pledge or pawn or otherwise deal with the property comprised in the estate, where necessary<sup>2</sup>. As has been pointed out, the debts

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1 Thomas, (1910) pt.1, p.70; Ajisafe, op.cit. p.81; Obi, op.cit., pp.151-2.

2 Thomas, (1910) pt.1, p.86; Thomas, "Marriage and legal customs of the Edo-speaking peoples" (1910), 11 J.Comp. Leg. (N.S.) 94, at p.99; Thomas, (1914) pt.IV, pp.133-6; Bradbury, The Benin kingdom (1957) pp.47 and 77; Okojie, Ishan native laws and customs (1960) p.90; Obi, The Ibo law of property (1963) pp.151-2; Lloyd, [1959] J.A.L.7 at p.16; Lloyd, Yoruba land law (1962) p.287,

owed by the deceased are payable from his estate during the process of administration; and the expenses of his burial and funeral may be charged against the estate. Similarly, the demand suddenly made by a father-in-law with respect to the marriage between a son of the deceased and the former's daughter may be met in this way.<sup>1</sup>

He must not, however, engage in unnecessary sale or alienation of the deceased's property, since, as has been noted, he is only a caretaker, and has a duty to preserve as much as possible of the estate. In point of fact, he is obliged to seek and obtain the approval of members, especially of the elders, of the family before exercising his powers of sale, pledge or pawn, etc., indicated above. Thus, Lloyd has reported a case among the Egba (Yoruba) where the customary court upset the agreement entered into by the administrator with respect to the pawn of the property of the deceased, on the ground that the approval of the family had not been secured regarding the transaction<sup>2</sup>. However, the approval of the members of the family is more readily given in respect of the administrator's dealings with the perishable

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1 See, for instance, Okojie, op.cit., pp.91-2.

2 Lloyd, Yoruba land law, p.287.

portion of the estate, harvested crops, for instance<sup>1</sup>; which, for obvious reasons, may be wasted if such approval is withheld.

He is entitled to supervise the business of the deceased, if any, or to carry it on personally, if this latter course is necessary for the proper management of the estate<sup>2</sup>.

(4) Maintenance of the dependants of the deceased

The administrator steps into the shoes of the deceased as regards the maintenance, during the period of administration, of the latter's dependants; who may be widows, children and others to whom he stood in loco parentis<sup>3</sup>.

(a) Widows

As regards the maintenance of the deceased's widows, the main duty of the administrator may be described as the negative one of ensuring that the existing facilities provided for them by their late husband are maintained. Thus, he merely permits them to continue to occupy the living accommodation arranged for them by the deceased;

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1 Thomas, (1910), pt.1, p.68; Thomas (1914), pt.IV, pp.133-6.

2 See: Thomas, (1910), pt.1, p.86.

3 See: Thomas, (1914), pt.IV, pp.127,133-6; Basden, Niger Ibos (1938) p.422; Obi, op.cit., p.151.

and to continue their farming activities on plots of land that may have been allotted to them for this purpose by their husband<sup>1</sup>. He will not normally be responsible for clothing them during the period of administration which, as we shall see, may not exceed a few weeks. But he has the responsibility to feed these of them who are unable to provide for themselves in this regard, since this was one of the obligations of the deceased.

The cost of maintaining the widows constitutes a charge on the estate of their deceased husband, on the ground that the administrator is merely discharging the duty assumed by the deceased by virtue of the contract of marriage.

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- 1 On the obligation of a husband to maintain and support his wife or wives, see: Thomas, (1910), pt.1, pp.47 ff; Thomas, (1914), pt.IV, p.140; Ajisafe, op.cit, pp.61-2; Ward, The Yoruba husband-wife code (1938) pp.56-7; Talbot, The peoples of southern Nigeria (1926), vol.III, p.678; Talbot, Tribes of the Niger Delta (1932), p.205; Meek, Law and authority in a Nigerian tribe (1937), pp.100-102 and 202; Meek, Land tenure and land administration in Nigeria (1957) p.186; Green, Land tenure in an Ibo village (1941) pp.13-14; Green, Ibo village affairs (1947) p.34; Spörrndli, "Marriage among the Ibos", (1942-5), 37 Anthropos 113 at p.118; Harris, "Some aspects of the economics of sixteen Ibo individuals" (1944) 14 Afr. 302 at p.328; Jones "Ibo land tenure", (1949) 19 Afr. 309 at p.315; Ardener, "The kinship terminology of a group of southern Ibo," (1954) 24 Afr. 85 at p.88; Forde, Yakò studies (1964) pp.18 ff and 40.

He is not, however, justified in providing maintenance for any of the widows marrying outside their late husband's family while the process of administration is in progress; or any known to have been engaged in associations tending to lower the name and social position of their deceased husband's family. Such widows must be made to vacate both the residential accommodation and farm land provided for them by the deceased<sup>1</sup>.

In practice, however, very little may be spent in respect of the maintenance of the deceased's widows. Firstly, women are generally able to fend for themselves, with little help from their husbands<sup>2</sup>. As has been seen, they grow their own crops on the land allotted to them by their husbands; in addition to their farming activities, they practically monopolise petty trading<sup>3</sup>,

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- 1 See: the Yoruba case of Omoniregun v. Sadatu (1888) R.C.J.15; noted by Stopford, J.G.B., "Glimpses of native law in West Africa," (1910) 1 J.A.S.80, at pp.85-6.
  - 2 Ajisafe, The laws and customs of the Yoruba people (1924) p.62; Ward, Marriage among the Yoruba (1937) pp.34-5; Ward, The Yoruba husband-wife code (1938), pp.58-67; Meek, Law and authority in a Nigerian tribe (1937)p.100; Leith Ross, African women (1938), pp.91-2, 225 and 228; Green, Land tenure in an Ibo village (1941) pp.33 ff; Green, Ibo village affairs (1947),pp.36,170-172; Ford and Scott, The native economies of Nigeria (1946),pp 67-8 and 73; Anon, "Calabar" (1956) 52 Nigeria 70 at p.85.
  - 3 Thomas, (1910), pt.1, p.19; Basden, Among the Ibos, (1921) p.93; Basden, Niger Ibos (1938),pp.208 and 334; Talbot, (1926), vol.III,pp.428 and 678; Meek, (1937), pp.19 and 98; Ward, (1937) pp.34-5; Ward (1938),pp.130 and 137; Leith Ross, op.cit., pp.86-7; Ajisafe, op.cit., pp.62-3; Green (1947), pp.37 ff and 171; Forde and Scott, op.cit.,pp.49 ff; Omoneukanrin, Itsekiri law and custom (1942) p.84; Okojie, op.cit., p.26.

234

and cases of wives richer than their husbands (and who rely on their prosperous wives for support) are not altogether unknown.<sup>1</sup> Concerning the ability of the Itsekiri woman to support herself, Lloyd writes:

"... she is usually able to live independently, since many Itsekiri women become wealthy as traders and most can be self-supporting from fishing or craft industries....." (2)

Secondly, the would-be husband of a widow very often undertakes the obligation to provide for her soon after the death of her former husband<sup>3</sup>. Such maintenance prior to the formal settlement of the question of the widow's remarriage within her deceased husband's family is designed to serve two purposes: it helps to secure and sustain her consent to the new proposal, especially where, as we shall see, several relatives of the late husband have the right to take her as wife, and there is a contest; it is calculated to impress and assure her as to the ability of the new suitor to discharge his future matrimonial obligations towards her. Thirdly,

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1 Meek, Law and authority in a Nigerian tribe (1937) p.203.

2 Lloyd, "The Itsekiri" in the Benin kingdom (1957), ed. Bradbury, p.198.

3 As among the Itsekiri. See, Omoneukanrin, op.cit. p.74.

a woman's children, especially where they are grown up and she is old, usually take it upon themselves to provide for her<sup>1</sup>. The basis of such maintenance, however, is filial regard rather than legal obligation. If, however, she is old and has no children, she may be attached to any male member of the family as her nominal suitor - nominal because she is then regarded more as a mother than a wife.<sup>2</sup>

(b) Children and other dependants of the deceased

It is the duty of the administrator to make adequate provision out of the estate for the maintenance of the deceased's children and other dependants of the dead man, such as the orphaned children of a deceased relative. They must be reasonably housed and adequately fed and clothed.

He must pay for the cost of providing books and tuition for those of the dependants at institutions of learning. It is also his duty to settle the bride price of the first marriage contracted by a son of the deceased

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1 See: Thomas, "Some Ibo burial customs", (1917) 47 J.R.A.I.163, at p.198; Leith Ross, op.cit., p.92; Lloyd, [1959] J.A.L.7, at p.13; Lloyd, Yoruba land law (1962) p.284.

2 See: Ajisafe, The laws and customs of the Yoruba people (1924) pp.84-5.



during his tenure of office<sup>1</sup>; and he must ensure that part of any bride price received by him in respect of the marriage of a daughter of the deceased is given to the mother of the girl in connection with the provision of the bride's marriage outfit<sup>2</sup>. He is, however, entitled to use part of such bride price in settling the amount demanded by the father-in-law of a son of the deceased; for, as a learned author puts it, "what is received on the swings is spent on the roundabouts<sup>3</sup>".

As in the case of the maintenance of the widows, the administrator is, in practice, not required to spend a great deal in providing for the children and other dependants of the deceased. This is because, most women are, as has been pointed out, well off; and can, therefore, be counted upon in this regard. Besides, the

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- 1 Okojie, op.cit., pp.91-2. The administrator is merely discharging the obligation of the deceased to provide the bride price required in connection with the first marriage contracted by his son. On the obligation of a father in this regard, see: Meek (1937), p.267; Harris, (1944) 14 Afr. 302 at p.304; Bradbury, op.cit. pp.30 and 48; Forde, Yakö studies (1964) p.123; also Forde, Marriage and the family among the Yakö (1941) p.50.
  - 2 The mother of the bride is also under a duty in this connection. On this, see: Welch, "The Isoko tribe" (1934) 7 Afr. 160, at p.171; Meek, (1937), loc.cit.; Omoneukanrin, op.cit. p.42; Leith Ross, op.cit., p.102; Green, Ibo village affairs (1947) pp.97 and 161; Bradbury, op.cit., p.158.
  - 3 Meek, (1937) loc.cit.

children of a widow, though not parties to the agreement, are invariably covered by the arrangement described above under which a prospective husband maintains a wife of the deceased. In any case, the children of one mother - mature or young, rich or poor - quite naturally bind themselves together in providing for one another, since it has been aptly stated that the household is "an economic grouping which supplies most of its own needs, men, women and children all contributing"<sup>1</sup>.

### The widower

With respect to the widower, it will suffice to say that the administrator of a married deceased woman is under no legal obligation to maintain her husband out of the estate. This is because a wife is not legally responsible under customary law for the maintenance of her husband. It must, however, be noted that, in practice, a wife invariably contributes to the cost of feeding the household. But such contribution is nearly always drawn from the resources provided by the husband; for example, the land on which she grows her crops, or in some cases, the capital which she employs in her petty trading<sup>2</sup>.

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1 Meek, (1937), p.100.

2 See: Ajisafe, op.cit, pp.62-3; Ward, Marriage among the Yoruba (1937) pp.34-5; Ward, The Yoruba husband-wife code (1938) p.58.

The seat of the administration of, and the concern shown by a woman's family over, her estate are such that the plea of her husband to be maintained out of the estate is unlikely to receive sympathetic consideration. For, on the death of a married woman, her corpse is usually conveyed to her family residence for burial<sup>1</sup>; and, as we shall see later, all her property - except in those societies where a husband may be entitled to part of it - is similarly removed for distribution among those entitled.

From the social (prestige) point of view, no husband worth the term will require to be maintained by his deceased wife's administrator. For, while he will naturally welcome any contribution his wife may make towards the domestic budget during her lifetime or her helping to support him during this period; he will resent the idea of his being maintained out of her estate, now in charge of her administrator, as particularly revolting to his customary notion of the superiority of a man vis-a-vis his wife. The whole question may be dismissed as unheard of as the idea that " a man marrying a woman

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1 Thomas, (1910), 11 J. Comp. Leg. (N.S.) 94, at p.96; Leith Ross, op.cit., p.210; Green (1947), pp.97 and 165; Esenwa, "Marriage customs in Asaba Division", (1948) 13 Nigerian Field 71, at p.74; Okojie, op.cit. pp.121-2; Jones, The trading states of the Oil Rivers (1963) p.52.

should live with her in her house"<sup>1</sup>.

(5) Giving account of his administration

At the expiration of the period of administration, the administrator gives an account of the manner in which he has dealt with the estate to the members of the deceased's family, usually at a meeting of the family specially summoned for the purpose.

He must keep the family informed as to how the burial and funeral contributions have been spent; and as to the amount he has realised from the deceased's estate as a result of the sale, pledge or pawn of property comprised therein. Similarly, he must indicate the extent of donations, if any, he has received from sympathisers. Other matters in respect of which he is obliged to report to the family include the amount used in paying off the debts of the deceased, including the extent of the debts due to, and due from, him, still remaining unpaid; the cost of maintaining the dependants indicated above; and, above all, the various items of the property comprised in the net estate available for distribution.

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1 Nwugege v. Adigwe and anor. (1934) 11 N.L.R.134, at p.135; per Graham Paul, J.

### Duration of the period of administration

There is no uniform practice as regards the length of the period that the administration takes or must take. It varies from society to society; and, sometimes, variations occur within the same society. Thus, while the process of administration is usually completed within a week of the death among the Bini<sup>1</sup>, Ivbiosakon<sup>2</sup> and Isoko<sup>3</sup>; this runs to a period of some three months among the Ishan<sup>4</sup>, Urhobo<sup>5</sup> and Yoruba<sup>6</sup>. The relevant period among the Itsekiri is about one year, the performance of the last mortuary rites being timed to coincide with the first anniversary of the deceased's death<sup>7</sup>. The most noticeable instances of lack of uniformity in this regard, however, are found among the

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- 1 Egharevba, Benin law and custom (1949) pp.73-4; Bradbury, op.cit., p.50.
  - 2 Thomas, Anthropological report on the Edo-speaking peoples (1910), pt.1, p.74; Talbot, The peoples of southern Nigeria, vol.III, p.486; Bradbury, The Benin kingdom (1957) p.98.
  - 3 Welch, "The Isoko tribe" (1934) 7 Afr. 160, at p.172.
  - 4 Okojie, op.cit., pp.69,103 and 124.
  - 5 Thomas, "Notes on Edo burial customs" (1920) 50 J.R. A.I. 377, at pp.404-5; Talbot, op.cit., p.487; Bradbury, op.cit., p.152.
  - 6 Ajisafe, op.cit., pp.84-5.
  - 7 Omoneukanrin, Itsekiri law and custom (1942) p.73.

241

Etsako<sup>1</sup> and Ibo<sup>2</sup>; where the relevant period is said to range from about one week to about one year, depending upon the localities concerned in these societies.

The diversity shown in the custom governing the duration of the period under consideration may be accounted for by the fact, which has already been mentioned, that the performance of the burial and funeral rites - a vital aspect of the administration - may be accelerated or delayed, depending on the resources of those responsible for the carrying out of these rites.

#### RIGHTS OF THE ADMINISTRATOR

Rights of management (sale, pledge or pawn) of the estate; of settling debts; and of maintenance of dependants

Most of the rights of the administrator have already been considered in the section of this chapter dealing with the scope of his duties and powers. It now remains to examine what right he has to remuneration by virtue of his office.

#### Right to remuneration

The right of the administrator to remuneration arises only in the exceptional case where he is not a

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1 Thomas, (1910), pt.1, pp.45,71-4; Talbot, op.cit. p.486.

2 Meek, Law and authority in a Nigerian tribe (1937) pp.311-2; Obi, The Ibo law of property (1963)p.152.

close relative of the deceased; when he is paid, often in kind and out of the estate, for his services. An administrator who is also a close relative of the dead man may be given nothing more than a token gift of some of the property he has administered on the ground that administration is, as we have pointed out, the concern of the deceased's family, imposing as it does an obligation on all close relatives to render assistance.

The attitude of the customary courts in this matter may be gauged from the observation of a learned author who writes:

"The courts admonish him to take only a token for himself qua executor. The customary courts will sometimes allow the 'babansinku' [i.e. administrator] who is not closely related to the deceased, to take a share of the property to which he would not ordinarily be entitled." (1)

As has been seen, and will be appreciated later, no injustice is normally caused by denying an administrator, who is also a close relative of the deceased, the right to remuneration: he may be the person entitled to the whole or the major share of the estate, a situation that hardly calls for his being remunerated by anyone else.

### HIS LIABILITIES

#### Liability for misappropriation

Concerning the liability of the administrator for

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1 Lloyd, Yoruba land law (1962) p.287; cf. Lloyd, [1959] J.A.L.7, at p.16.

his misappropriation of the property comprised in the estate, it is necessary to observe that we have excluded from the discussion the position of an administrator who is at the same time the sole beneficiary of the estate. This is because the question of misappropriation hardly arises in such a case. We are thus left with the instance of the administrator who is not solely entitled to, or who has no rights of inheritance in respect of, the estate.

Cases of misappropriation by an administrator are usually rare since, as has been pointed out, the tenure of this office may be a matter of a few weeks; and, in any case, the concern shown by the family in the administration constitutes an effective check in this regard. Should he, however, commit acts of misappropriation, not merely of waste<sup>1</sup>, the members of the family may compel him to make good the loss occasioned; or an action may lie against him in the court at the instance of the person or persons entitled to inherit the estate.<sup>2</sup>

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1 The courts, including the Superior Courts, take a rather lenient view of this. See In re Hotonu (1892) R.C.J.18; noted by Stopford, in (1901) 1 J.A.S.80, at p.88.

2 In addition, such misappropriation may attract criminal liability. See the Criminal Code, cap.28, ss.324 and 331, Laws of the Western Region of Nigeria (1959); cap. 42, ss.383 and 389, Laws of the Federation of Nigeria and Lagos (1958); i.e. the offence of stealing.



Liability to be censured or to be removed by the family

As has been noticed, the administrator is appointed by, or with the co-operation of the family of the deceased. And, apart from the supervision which they exercise over him, including their authorisation of almost all his dealings with the estate, he is liable to be censured by them for the shortcomings in his administration.

He is also liable to be removed by or at the instance of the family upon any ground or grounds disclosing his inability and/or gross incompetence with respect to the discharge of his duties. Specific instances of such inability or incompetence include his

- (i) failing to arrange the burial and funeral ceremony of the deceased in a manner at once befitting the dead man's station in life, and enhancing the prestige of the family;
- (ii) failing to collect or collect promptly the debts owing to the deceased;
- (iii) failing to manage the estate in such a way that the debts or a good proportion of them owed by the deceased are paid, and the family are saved any embarrassment by his creditors;
- (iv) attempting to dispose of the property comprised in the estate without obtaining the approval of the

family;

- (v) failing or neglecting to maintain the dependants of the deceased;
- (vi) misappropriation of the property entrusted to him; and
- (vii) resenting the supervision exercised over him by the family of the deceased.

PART FOURCUSTOMARY LAW IN THE MID-WESTERN REGIONCHAPTER SEVENDISTRIBUTION OF ESTATESCLASSIFICATION OF THE VARIOUS SYSTEMS OF SUCCESSION FOUND  
IN THE REGION, INCLUDING CONSIDERATION OF SOME GENERAL  
PRINCIPLES GOVERNING DISTRIBUTIONScope of inquiry

As indicated above, this part of the thesis will be devoted almost exclusively to a discussion of the various systems of the customary law of succession found among the indigenous peoples of the Mid-Western Region. However, this restriction of our field does not imply that the relevant rules of the customary law obtaining in other parts of southern Nigeria may not be referred to where this is necessary for the purposes of stressing points of divergence; or where such reference helps to throw some light on obscure aspects of the law of our area of special reference.

It must, however, be stressed that this restriction of our field to the Mid-Western Region excludes, in effect, the Yoruba customary law of succession, except on the basis indicated. The customary law of the Ibo inhabiting the Eastern Region is as relevant to our discussion as

that followed by the Ibo of the Mid-Western Region, since the rules observed by both sub-groups are similar<sup>1</sup>. On similar considerations, the customary law of succession found among the Ijaw of the Eastern Region will be discussed in this part of the thesis.

Succession to titles and offices: chieftaincies, customary priesthoods, etc.

The rules governing succession to titles, such as chieftaincies, are essentially topics belonging to that branch of the law which may be termed customary constitutional law. Succession to offices, like customary priesthoods and headship of the family, is more germane to the fields of anthropology, sociology and religion than to a work on law. For these reasons, succession to titles and offices is excluded from this work.

MAIN PATTERNS OF SUCCESSION IN THE REGION

The rules of inheritance found among the ten main ethnic groups inhabiting the Mid-Western Region may be classified into three main patterns in the essentially patrilineal societies; with a fourth pattern for the groups where both the patrilineal and matrilineal systems of succession

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1 See: Thomas, Anthropological report on Ibo-speaking peoples (1914), pt.IV, p.127.

exist side by side. The basis of our classification, which will be shown more fully in the next four chapters of this part of the work, is whether only eldest sons, or all sons or all children, are entitled to inherit from one or both of their parents.

The four main patterns we may refer to as:

- type "A", which is found among the Ishan and holders of hereditary titles among the Bini, under which the eldest son takes exclusively;
- type "B", which covers the Ibo and Ivbiosakon, where only sons inherit;
- type "C", which is followed by the Bini (other than the holders of hereditary titles), Isoko, Itsekiri and Urhobo and Akoko-Edo, under which all children participate in the benefits of the inheritance; and
- type "D", which represents the system found among the Etsako and Ijaw, where the inheritance rights of children with respect to their father's estate are determined largely by the type of marriage (customary) contracted by their parents.

Warning must, however, be given in connection with our classification. The first is that these patterns must not be considered in water-tight compartments. There are, as will appear later, variations within each pattern and,

indeed, within the individual societies included in each of the patterns. And, in contrast, quite striking similarities on specific and isolated points are sometimes detectable between groups having otherwise divergent systems of succession. The second warning is that, even in some of the predominantly patrilineal societies, the matrilineal principle of inheritance often asserts itself; and, as will become apparent later, the maternal relatives of a deceased person are often included in the list of the beneficiaries of his estate.

#### SOME GENERAL PRINCIPLES

##### Definition - "Heir" or "successor"

Under the general law applicable in both the Federal Territory of Lagos and the Eastern Region (i.e. the old English rules of inheritance and distribution), the word "heir" is used to indicate the person who succeeds to the real property of an intestate<sup>1</sup>; in contradistinction to the next-of-kin who take the personal property.<sup>2</sup> As regards the Western and Mid-Western Regions, the word (heir) has lost much of its importance since 1959, when descent to the heir on intestacy was abolished. Section 48(1) of the

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1 See: the Inheritance Act (1833)(3 & 4 Will.4, c.106), s.3; and chap.4 of this work.

2 See: the Statutes of Distribution - (1670) 22 & 23 Car.2, c.10; and (1685) 1 Jac.2, c.17. Also chaps 3 and 4.

Administration of Estates Law<sup>1</sup>, which abolished such descent in the latter Regions, provides:

"With regard to the real estate and personal inheritance of every person dying after the commencement of this Law [i.e. the 23rd April, 1959] there shall be abolished -

- (a) All existing modes, rules and canons of descent, and devolution by special occupancy or otherwise, of real estate, or of a personal inheritance, whether operating by the general law or otherwise howsoever....."

The word "successor" is usually employed in connection with succession where titular rights pass to another holder on the death of a corporation sole, such as the Crown; or where property passes to the next incumbent on the death of corporation sole, such as a bishop or parson<sup>2</sup>.

To a considerable extent, the word "heir" is nowadays used to refer to the person entitled to succeed either to the real property or the personal property of an intestate<sup>3</sup>, and the word seems interchangeable with the term "successor"<sup>4</sup>.

1 Cap.1, Laws of the Western Region, 1959; cf. the Administration of Estates Act (1925) 15 Geo.5, c.23; s.45. But, although descent was abolished, the word "heir" is still retained for some purposes. For example, if property is limited after 1959 (in the Western and Mid-Western Regions) to "heirs" or "heirs of the body" of a particular person, those so entitled to take will be ascertained in accordance with the old rules of inheritance; unless the context indicates a contrary intention: Property and Conveyancing Law, cap.100, ibid., s.147; the Administration of Estates Law, cap.1, ibid.; cf. Law of Property Act, 1925, (15 Geo.5, c.20), s.131. Also, the word "heir" must still be used for the purpose of creating an entailed interest: cap.100, op.cit., s.148; cf. Law of Property Act, op.cit., s.132; and the Administration of Estates Act (1925) (15 Geo.5, c.23) s.51(1).

2 See: Byrne, W.J. A dictionary of English law (1923), p.847; Jowitt, E., The dictionary of English law (1959) vol.II, pp.1694-5.

3 Aitkinson, T.E. Handbook of the law of wills (1953)p.4.

4 Aitkinson, loc.cit.; Jowitt, op.cit. vol.I, p.900.

Meanings attached to the words by writers on the peoples  
of the Region

"Heir"

There is general agreement among writers on the peoples of the Mid-Western Region as to the meaning to be attached to the word "heir" in their works<sup>1</sup>.

Writing in 1910 on the inheritance rules of the Edo-speaking peoples, Thomas states:

"A man's legal heirs are his own children<sup>2</sup>.... where there are no children, the deceased's firstborn brother (any wife) takes the property ....Failing brothers, the next heir is odioekelafe or head of the great family". (3)

Bradbury's use of the word conveys precisely the same

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- 1 See generally: Roth, H.L., "Notes on Benin customs" (1898) 11 Internationales Archiv für ethnographie, 235 at p.239; Roth, Great Benin: its customs, art and horrors (1903) pp.97 and 100; and the authorities quoted therein; Granville, R.K. and Roth, F.N., "Notes on the Jekris, Sobos and Ijos of the Warri District." (1898-9) 28 J.R.A.I. 104 at p.118; Thomas, Anthropological report on the Edo-speaking peoples (1910), pt.1, pp.47,54,64 ff; Thomas, "Marriage and legal customs of the Edo-speaking peoples" (1910) 11 J. Comp.Leg. (N.S.), 94 at pp.95-7, 99-100; Thomas "The Edo-speaking peoples" (1910) 10 J.A.S. 1 at 5-6 and 8; Thomas, Anthropological report on Ibo-speaking peoples, pp.127 ff; Talbot, The peoples of southern Nigeria (1926), vol.III, p.684; Rowling, Land tenure in Benin Province (1948), paras. 23,49 and 65; Omoneukanrin, Itsekiri law and custom, p.74; Bradbury, The Benin kingdom, pp.15,30,41,46-7,72,77,97, 106-8 and 120; Okojie, Ishan native laws and customs (1960) pp.63-4, 68-70, 91-2, 103 and 119; Obi, S.N.C. The Ibo law of property (1963) pp.154 ff.
  - 2 Thomas, Anthropological report on the Edo-speaking peoples, pt.1, p.64.
  - 3 Op.cit., p.71.



meaning when he says:

"Almost everywhere the senior surviving son of a dead man is regarded as the chief heir to his property..." (1)

As regards who are a woman's heirs, Thomas writes:

"A woman's property goes to her children....If there are no children the husband takes all that the woman made in his house; the remainder goes back to her family, the heirs being (1) brother (2) sister, or (3) father's brother<sup>2</sup>."

Bradbury's statement of the Benin customary law on the point is as follows: "If she has no children, her brothers and sisters are her heirs<sup>3</sup>".

### "Successor"

Like the word "heir", the word "successor" has acquired a definite meaning among writers on the Mid-Western Region, who have used it in connection with the devolution of titles, offices and statuses possessed by a

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1 Bradbury, op.cit., p.15.

2 Thomas, Anthropological report on the Edo-speaking peoples, pt. p.77.

3 Bradbury, op.cit., p.47.

deceased person<sup>1</sup>. Thus, Talbot, writing on the "kingship" title among the Etsako, says:

"The burial of a king is not carried out until his successor has been appointed". (2)

On the devolution of the title of odion among the Isoko, Welch states:

"Whenever an odion dies, his quarter chooses the successor."<sup>3</sup>

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1 The literature on this point is prolific. Some of the writers have employed the words "succeed to" or the word "heir" or "heir-apparent". See: Cardi, C.N. "A description of the natives of the Niger Coast Protectorate.." in West African studies (1899) ed. Kingsley, M.H., p.451; Roth, "Notes on Benin customs" (1898) 11 Internationales Archiv für ethnographie, 235 at p.239; Roth, Great Benin... (1903) pp.98-100, and the authorities quoted therein; Anon, "Notes on the form of the Bini government", (1904) 4 Man 50 at pp.52 and 54; Rumann, W.B. "Funeral ceremonies for the late ex-Oba of Benin (1914) 14 J.A.S. 35, at p.36; Thomas, "Notes on Edo burial customs" (1920) 50 J.R.A.I. 377 at p.405; Talbot, The peoples of southern Nigeria (1926) vol.1, pp.153 ff. and 333; vol.III, pp.486,496,579 and 589 ff; Moore, W.A. History of Itsekiri (1930) pp. 23-4 and 90; Welch, "The Isoko tribe" (1934) 7 Afr. 160 at 167; Dennett, R.E., At the back of the black man's mind (1906) pp.176-7 and 180; Hubbard, The Sobo of the Niger Delta (1948) p.257; Egharevba, Benin law and custom (1949) pp.24 and 37; Egharevba, A short history of Benin (1960) 3rd edn., pp.7 ff, 14-15, 21,26 and 36 ff; Bradbury, "Some aspects of the political organisation of the Benin kingdom" (1952) 1 W.A.I.S.E.R. Proc. conf. 50 at p.54-55; Bradbury, The Benin kingdom (1957), pp.15,30,41,72,98, 105 and 147; Lloyd, "The Itsekiri" in the Benin kingdom, ed. Bradbury, pp.191-2; Okojie, Ishan native laws and customs (1960), pp.63-70; 241 ff.

2 Talbot, op.cit., vol.III, p.486.

3 Welch, loc.cit.

And Bradbury sums it up for all the Edo-speaking peoples when he writes:

"Almost everywhere the senior surviving son of a dead man is regarded as... the successor to whatever offices, privileges and duties he may have had" (1)

Judicial authorities on the meaning of the word "heir"

Like the text-book writers, the courts have used the word "heir" to describe the person who inherits the property - movable or immovable - of a deceased person under the customary law rules relating to intestacy.

In the Urhobo case of In the Estate of Agboruja<sup>2</sup>, Ames, Ag.S.P.J., observed, inter alia:

"It is quite clear that the half-brother is the ... heir of the deceased according to the law and custom of his tribe (which probably is Urhobo as his country is near Warri). This means that he inherited everything left by the deceased..... The custom by which a man's heir is the next male relative, whether brother, son, uncle or even cousin, is widespread throughout Nigeria" (2)

In Iyamuse Ehigie v. Gregory Ehigie<sup>3</sup>, where the Benin customary law of succession was recently stated in proceedings before the Benin grade "A" customary court, the president had occasion to employ the word "heir" in his judgement. He said:

"It is one of the fundamental principles of Benin customary law of succession that the eldest male child who performs

1 Bradbury, The Benin kingdom (1957), p.15.

2 (1949) 19 N.L.R.38.

3 [1961] All N.L.R.842; [1961] W.N.L.R.307.

all the customary funeral ceremonies at the burial of his deceased father succeeds his father as heir and inherits his properties except that which he gave away before his death..." (1)

Meaning ascribed to "heir" and "successor" in this work

It will have been apparent from the literature referred to and the judicial authorities cited, what meaning both the learned writers and the courts have attached to the word "heir". The word means any person beneficially entitled to or interested in the property of another dying intestate. It has been stated that the word "successor" is often used interchangeably with the term heir<sup>2</sup>. Accordingly, both words will be used in this work in designating any person who inherits the property of a deceased person dying intestate.

Classes of "heirs"

We shall see later that in the majority of cases, the estate of a person dying intestate passes not just to one individual - be he a son, brother or other relative - but it descends to a group of persons who may have different rights to different categories of property comprised in the estate. For example, an eldest son or all the sons may have exclusive inheritance rights over their deceased father's house, lands and permanent crops; while the dead

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1 [1961] All N.L.R. at p.845; [1961] W.N.L.R. at p.309.

2 See: Aitkinson, T.E., Handbook of the law of wills (1953) p.4; Jowitt, loc.cit.

man's brothers and even sisters may be entitled to some of his movable property, such as, articles of clothing, household furniture and implements of trade or occupation. In other words, in the majority of the systems of inheritance found among the indigenous peoples of our area of special reference, the benefits of inheritance are not concentrated in one heir; but are dispersed among a group of heirs. It is, therefore, desirable to distinguish between these classes of heirs.

In the majority of cases where the mode of distribution is divisory, that is to say, where two or more heirs are jointly entitled to the estate, we intend to employ the term joint heirs<sup>1</sup> in referring to such heirs. For the less common type of heir, who is solely entitled to the inheritance, the term used is sole heir<sup>2</sup>. Again, as will appear later, one of the joint heirs<sup>1</sup> is usually entitled to a more substantial share of the estate than

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- 1 See: Thomas, Anthropological report on the Edo-speaking peoples (1910), pt.1, pp.64 and 73; Thomas, Anthropological report on the Ibo-speaking peoples (1914), pt.IV, p.60
  - 2 See: Roth, Great Benin (1903), p.97, quoting Nyendaël; Thomas, (1910), pt.1, op.cit., pp.64 and 74; Thomas, (1910), pt 1, op.cit., pp.64 and 74; Thomas, (1914), pt.IV, op.cit. p.128; Thomas, "Marriage and legal customs of the Edo-speaking peoples" (1910) 11 J.Comp. Leg.(N.S.) 94 at p.95; Bradbury, The Benin kingdom (1957) p.106.

any of the other joint heirs<sup>1</sup>. Where this is the case, we shall designate such an heir as principal heir<sup>2</sup>; while the other joint heirs having lesser rights in the estate we shall describe as the subsidiary heirs<sup>3</sup>.

#### Ascertainment of the heir/s

Throughout the Mid-Western Region, a deceased intestate's heir or heirs are generally well known and can be ascertained at any given moment, including the lifetime of the deceased. Neither choice nor appointment by any person is required to establish them as heirs. They are heirs by birth, not by being so appointed or chosen<sup>4</sup>.

- 1 See: Thomas, Anthropological report on the Edo-speaking peoples (1910), pt.1, pp.64 and 74; Thomas, Anthropological report on the Ibo-speaking peoples (1914), pt. IV, p.60.
- 2 See: Bradbury, op.cit., p.77. He also uses the expression "chief heir", Bradbury, op.cit., pp.15,107. Thomas employs the term chief heir; Thomas, Anthropological report on the Edo-speaking peoples (1910), pt.1, pp. 65 and 80. Cf. Schapera who uses the term principal heir in referring to the eldest son among the Tswana - Schapera, I., A handbook of Tswana law and custom (1955), pp.230 ff. But, he also employs the word general heir: Schapera, ibid, at p.233.
- 3 The term minor heirs is sometimes used; for example, see Schapera, ibid, at p.237. We shall, however, avoid the use of the term throughout this work in order to avoid confusion where a minor is entitled to the estate as a sole heir or principal heir.
- 4 Contra: the position among the Akan peoples of Ghana, where the heir or, better still, successor is elected on personal merit and qualities. The selection is done by the members of the family of the deceased from a pool of candidates, who stand in varying degrees of blood relationship with him. See: Rattray, R.S., Ashanti law and constitution (1956 impression) pp.3-4; Danquah, J.B., Akan laws and customs (1928) p.184; Allott, Essays in African law (1960), pp.136, 234 and 239; Ollennu, N.A., The law of succession in Ghana (1960) pp.7-12.

The criterion governing heirship is generally blood relationship with the deceased; and the closer a man's degree of such relationship is with the deceased, the greater are his chances of his being the deceased's heir, sole or principal.<sup>1</sup> This is why a man's eldest son is usually his sole or principal heir.

Indeed, this position of the eldest son is so well known to all that, in some cases, his father treated him in a special way during his (father's) lifetime.

Thus, among the Ishan, "a man made a public statement of his first son by giving him the hearts of all animals slaughtered in his compound, so that by the time he died all Egbele (2) were aware of who was his heir.(3)"

It should perhaps be observed that, unlike the position among some peoples of southern Africa<sup>4</sup>, the eldest son in the Mid-Western Region is the firstborn son by any wife, not necessarily the first wife<sup>5</sup>.

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- 1 See the authorities on the peoples of the Mid-Western Region referred to in footnotes 2 on p.256 and 2 on p.257.
  - 2 I.e. family (Ishan).
  - 3 Okojie, op.cit., p.119; also pp.68 and 70. Okojie communicated this information to Bradbury when the latter conducted his ethnographic survey: Bradbury, The Benin kingdom (1957), p.77n.
  - 4 The Tswana, for instance: Schapera, op.cit., pp.130 and 232.
  - 5 Okojie, op.cit., 119; also Thomas, Anthropological report on the Edo-speaking peoples (1910), pt.1, p.70; Thomas, Anthropological report on Ibo-speaking peoples (1914), pt.IV, p.217.

## THE ESTATE

### Assets and liabilities

The rights and interests of the deceased which the law recognises as being transmissible to his heirs on his death intestate constitute the assets comprised in his estate.

But the deceased is unlikely to have led a life in which he acquired rights and interests without incurring any obligations, such as those arising from contract or civil wrong. Such obligations of the deceased remaining unsatisfied at the time of his death constitute the liabilities of his estate.

#### 1. Assets

The rights and interests comprised in the deceased's estate may include not only interests in corporeal property; but also rights over persons, which may be collectively termed his "authority" over such persons.

##### (a) Rights and interests in property

##### (i) Movable property

In this category are included his rights and interests in respect of those objects of personal use, such as household articles and furniture, livestock, occupational or agricultural implements, articles of dress and personal adornment, money, etc., acquired by



an individual for his personal use. Such personal chattels are held by their proprietor as his absolute property.

(ii) Immovable property: land and trees

Land

The system of land tenure in the Mid-Western Region is such that group or communal rights and interests in land are commoner than those held by individuals. This situation has deceived quite a number of casual observers into believing that the individual's interests in land are not recognised as absolute anywhere in the Region.<sup>1</sup> The truth, however, is that the admittedly predominant interests of the group or community exist side by side with those held by individual "absolute owners"<sup>2</sup>, under a somewhat complex system of land tenure. And, it is

- 1 See, for instance: Thomas, Anthropological report on the Edo-speaking peoples.... pt.1, pp.91-4; Thomas, "Marriage and legal customs of the Edo-speaking peoples" (1910) 11 J. Comp. Leg. (N.S.), 94 at 100-101; Thomas, Anthropological report on Ibo-speaking peoples..pt.IV, pp.143; Omoneukanrin, op.cit, pp.87-8; Hubbard, The Sobo of the Niger Delta (1948) pp.38-40; Rowling, Land tenure in Benin Province (1948), paras. 5, 12-13, 41, 44-5, 58, 61, 64, 86-8, 107-8, 112 and 123.
- 2 He is by this term distinguished from the "limited owner" who may have only a life interest. See: Allott, A.N., "Towards a definition of 'absolute ownership'" [1961] J.A.L.99.

to the eternal credit of Bradbury, who has accurately and authoritatively described the position in this way:

"... rights over tracts of land are said to be vested in the chiefdom or village group, village, ward, extended family or lineage, and the individual...."(1)

### Trees

Under a system of land tenure which is predominantly communal, it may sound strange to those learned in English law to say that the absolute rights of an individual over trees and crops are more extensive than those he has in respect of land. The point, however, is that under customary law, the ownership of land does not necessarily coincide with the rights over the trees growing thereon<sup>2</sup>.

Any trees or crops planted by the deceased belonged to him as his private or individual property; and it makes no difference on whose land they were planted<sup>2</sup>. Self-sown trees and crops growing wild on his individually owned land form part of his property<sup>3</sup>. He may also have established

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1 Bradbury, The Benin kingdom, p.150.

2 Thomas, Anthropological report on the Edo-speaking peoples... pt.1, pp.95-6; Thomas, Anthropological report on ... Ibo-speaking peoples... pt.IV, pp.145-7 150-5; Hubbard, The Sobo of the Nigeria Delta (1948) pp.39-40; Rowling, op.cit., paras. 15,45,47-8, 51, 61, 63, 77, 86, 94 and 123. Bradbury, op.cit., pp.24, 45, 76-7 and 96; Okojie, op.cit., p.91.

3 Thomas, Anthropological report on ... Ibo-speaking peoples ... pt.IV, pp.149-152.

ownership over some trees growing wild on land owned by the group or community by clearing the spaces round such wild trees<sup>1</sup>; or depositing some objects, such as stones or medicines, on or around them<sup>2</sup>; or he may have claimed ownership of a particular tree by virtue of the fact that, when he was born, his umbilical cord had been buried at the foot of the tree<sup>3</sup>.

(b) Authority over persons

(i) Wives

The mystical bond of marriage uniting a husband and wife through the payment of the bride price made by the former survives his death; but not that of the wife. In other words, while the death of a deceased female terminates a marriage, the death of a male deceased, on the other hand, does not bring a marriage to an end. The result is, as will appear later, that the male deceased's rights or, better still, authority over his wives, may be taken over by his heirs. Two reasons have been given for the existence of this rule whereby the rights of a deceased hus-

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- 1 Thomas, Anthropological report on the Edo-speaking peoples, pt.1, p.95; Thomas, (1910) 11 J. Comp. Leg. (N.S.), op.cit., 94 at 101; Thomas, Anthropological report on Ibo-speaking peoples, pt.IV, p.154.
  - 2 Thomas, Anthropological report on the Edo-speaking peoples, pt.1, p.96; Thomas, (1910) 11 J. Comp. Leg. (N.S.) loc.cit.
  - 3 Dennett, "Notes from southern Nigeria" (1905) 16 Folklore 434 at p.439; Welch, "The Isoko tribe" (1934) Afr.160 at p.169; Green, Land tenure in an Ibo village (1941) p.20; Chubb, L.T., Ibo land tenure (1961), para.101.

band over his wives savour of "a species of inheritance"<sup>1</sup>. The first, which is now discredited,<sup>2</sup> is that the deceased's widows form part of his property to be distributed or inherited<sup>3</sup>. The second and acceptable reason is that

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- 1 Diamond, A.S., Primitive law (1935) p.244.
  - 2 Hartland, E.S., Primitive law (1924) p.114; Westermann, D., The African today (1934) p.125; Green, M.M., Ibo village affairs (1947) pp.97, 161-5; Jeffreys, M.D.W., "Lobola is child-price" (1951) 10 Afr. Stud. (Johannesburg) 145 at p.146; and see: Kingdsey, M.H., West African studies (1899) 438; who states that women must be considered as property in a different class.
  - 3 Thomas, Anthropological report on the Edo-speaking peoples, pt.1, pp.47 ff, 68 and 71 ff; Thomas, "Edo-speaking peoples" (1910) 10 J.A.S.1 at pp.5-6; Thomas, "Marriage and legal customs of the Edo-speaking peoples" (1910) 11 J.Comp.Leg. (N.S.) 94 at p.95; Thomas, "Notes on some Ibo burial customs", (1917) 47 J.R.A.I. 163 at pp.187 and 191; Roth, H.L. Great Benin, p.97; Dennett, At the back of the black man's mind (1906) p.199; Granville and Roth, F.N., "Notes on the Jekris, Sobos and Ijos of the Warri District" (1898-9) 29 J.R.A.I. 104 at 118; Talbot, The peoples of southern Nigeria, vol.III, pp.430-1, 680 and 685; Omoneukanrin, op.cit., pp.73-4; Esenwa, F.E., "Marriage customs in Asaba Division" (1948) 13 Nigerian Field 71 at p.74; Rowling, op.cit., para.49; In the Estate of Agboruja (1949) 19 N.L.R. 38 at p.39; Bradbury, op.cit., pp.47, 80, 96 108 and 152; Egharevba, Benin law and custom, pp.38 and 76; Okojie, op.cit., p.91. Some legally trained persons have even recently lent support to his untenable view. See, for instance: Molajo, E.A., "The Nigerian married women and the law" (1957) 1 Nigerian Bar Journal p.23; Coker, G.B.A., Family property among the Yorubas (1958), pp.35, 38-9 and 287. It is perhaps significant that Coker classifies a customary wife into the category of immovable property.

the institution of marriage is regarded by the customary law not only as a union between one man and one woman, but as a wider contract between the families of the spouses<sup>1</sup>.

The absurdity of the first view (that the widow is the deceased's property to be inherited) is readily seen from a brief examination of the true position of the widow under customary law.

Firstly, a widow by her marriage did not become the property of her deceased husband, like his slave<sup>2</sup>. No heir has ever been known to have sold a widow, whereas an inherited slave could, and might often, be sold by his inheritor. This comparison between the slave and the widow is of special significance: for marriage with a female slave, far from worsening her already lowly status, was one of the recognised ways whereby she became a freed woman<sup>3</sup>.

Secondly, unlike inherited property, which on distribution has no option but to descend to the heirs, a widow has the right to reject the new suitor chosen by

- 1 Lowie, H., Primitive society (1921) p.234; Allott, Essays in African law (1960) p.213.
- 2 Hartland, loc.cit.; Kingsley, op.cit., p.439, where she says: "The immediate rule of a husband over his wife may be likened to that of a constitutional monarch; that of a man or woman over a slave to that of an absolute monarch".
- 3 See: Thomas, Anthropological report on Ibo-speaking peoples (1914), pt.1, pp.111 and 119; Talbot, op.cit. vol.III, p.694.

the deceased's family to take her as wife. Where she exercises this right, the only remedy open to the rejected suitor is to ask for a refund of part of the bride price paid by the deceased in respect of the marriage with the widow<sup>1</sup>. This point arose in a neat form in the case of Loromeke v. Nekegho and anor.<sup>2</sup>, where the parties were Urhobo residing in Accra in Ghana. The plaintiff was the dead man's brother, allegedly chosen by the deceased's family to take as wife, the surviving customary widow, the second defendant in the suit. The deceased man, had died intestate, leaving the customary widow, the second defendant, and two young children born to him by her. The first defendant was the second defendant's father, to whom the bride price of the marriage between the deceased and the second defendant was paid. The case arose because of the second defendant's refusal to marry the plaintiff, who claimed to have been selected

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- 1 Thomas, Anthropological report on the Edo-speaking peoples (1910), pt.1, p.47; Thomas, (1910) 11 J.Comp. Leg. (N.S.), op.cit., 94 at p.96; Thomas, (1910) 10 J.A.S. op.cit., 1 at p.5; Okojie, Ishan native laws and customs (1960) p.91; In the Estate of Agboruja (1949) 19 N.L.R. 38 at p.39; Loromeke v. Nekegho and anor. (1957) 3 W.A.L.R.306 at pp.307-8; Okaludo v. Omama [1960] W.N.L.R. 149, a Kwale (Mid-Western Ibo) case, where it was specifically held that the amount of bride price diminishes according to the duration of the marriage; and, accordingly, Morgan, J., as he then was, affirmed a decision of a customary court reducing the bride price of £22 to £10, in respect of a customary marriage which had subsisted for five years.
- 2 (1957) 3 W.A.L.R.306.

by the deceased's family to take the second defendant as wife. He sued at the Accra grade "B" municipal court claiming the repayment of the sum of £12 representing part of the bride price paid by his deceased brother, as well as the custody of the deceased's two children by the second defendant.

The municipal court decided in favour of the plaintiff and, on appeal, this decision was affirmed by the magistrate's court. The defendants then appealed to the High Court which allowed the appeal on two grounds. The first was that there was no evidence that the plaintiff was in fact selected by the deceased's family as the second defendant's new husband. The second ground was that, granting he was so selected, the repugnancy principle governing the enforcement of customary law was infringed; since the custody of the children was, by the custom relied on by the plaintiff, to be given to a man whom the customary widow had refused to marry. In the words of the learned Judge:

".... the application of the custom is undoubtedly repugnant to natural justice, equity and good conscience<sup>1</sup>".

As regards the right of the customary widow to reject the deceased's heir as husband, the Judge remarked:

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1 At p.308.

"Evidence was in fact given that the widow was entitled to refuse but in that event was bound to refund to the family of the deceased £12 from the money paid to her on her marriage as dowry (1).... The evidence however was not seriously disputed by the defendants and in fact in cross-examination the first defendant confirmed the custom" (2)

Thirdly, even where the widow decides to marry again within her deceased husband's family, she has considerable freedom in the choice of her next husband<sup>3</sup>; and may, for instance, decide quite naturally to marry her late husband's relative who took the greatest care of her during the period of administration<sup>4</sup>.

Fourthly, were she inherited like property, her "inheritor" should have been able to pass her on to his heir, which is not the case. As a general rule, she is

- 1 Ibid., at p.307. See also In the Estate of Agboruja, op.cit., where the deceased's customary widow refused to marry his half-brother; and had to refund to him precisely the sum of £12. It is, however, not strictly correct, as Loromeke's case (op.cit.) tends to suggest, that the bride price is paid to the wife herself. The usual practice is to pay it to the wife's father or family. On this see: Thomas, (1910) 11 J. Comp.Leg. (N.S.), op.cit. 94 at p.97; Omoneukanrin, op.cit., p.41; Hubbard, The Sobo of the Niger Delta (1948) p.191; Bradbury, op.cit., pp.49,80,108, 121, 156 and 190; Okojie, op.cit. pp.91,103 and 118.
- 2 (1957) 3 W.A.L.R.306 at p.308.
- 3 Thomas, Anthropological report on the Edo-speaking peoples (1910), pt.1, p.75; Omoneukanrin, Itsekiri law and custom (1942) p.74; Bradbury, The Benin kingdom (1957) p.96.
- 4 As among the Itsekiri. See: Omoneukanrin, loc.cit.



taken as wife once only; and must not marry again within the family on the death of the husband's relative who took her as wife<sup>1</sup>.

Fifthly, the process by which a widow becomes the wife of the new suitor does not support the view that she is inherited like property. For, as a general rule, a special ceremony must be performed by the man before he is recognised as the lawful husband of the woman concerned<sup>2</sup>. Besides, there is the fact that she is usually married to her new husband before the actual distribution of her deceased husband's estate is carried out<sup>3</sup> - a fact which strongly lends support to our contention that she does not pass with the property comprised in the estate; and she is, therefore, not inheritable property.

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- 1 Thomas, (1910), pt.1, p.85. Omoneukanrin, loc.cit. Cf. the Marriage, Divorce and Custody of Children Adoptive Bye-laws Order, Western Region of Nigeria, W.R.L.N. 456 of 1958, s.10, which provides: "No dowry [i.e. bride price] shall be refundable ... where an inherited widow is divorced" It is, however, our view that the widow is not 'inherited'. Only the Ika (Agbor) local council area is known to have adopted this Bye-laws Order in the Mid-Western Region. See: W.R.L.N.4, 12 and 42-3 of 1959.
  - 2 Thomas, ibid, p.50; Bradbury, op.cit., p.152; Okojie, op.cit., p.91.
  - 3 Thomas, ibid; pp.72, 80 and 88; Omoneukanrin, loc.cit.; Bradbury, op.cit., p.97.

Sixthly, as will become apparent in the next two chapters, there are societies where a widow is free to return to her family, if she has surviving children for her deceased husband. It will also be shown in chapter eleven that in some societies the question of whether she is required to marry her deceased husband's kinsman is determined by the type of marriage she contracted with the deceased.

From the foregoing argument, it is quite clear that the widow cannot be ranked with her husband's property for the purposes of inheritance; nor can her husband's heir be said to have a proprietary right over her. His right in this connection cannot be put any higher than that he is entitled to take her as wife, provided that she gives her consent and blessing to his proposal. In other words, as a learned writer has described the position, the right of the heir is no more than "a right of 'first refusal' should the widow decide to remarry"<sup>1</sup>. The bride price paid in respect of her marriage does not, as a learned author has observed, "render her as a slave; rather it operates as a guarantee of her good treatment"<sup>2</sup>. However, it will be shown in the chapters on the distribution of estates, where the legal rights over children are also discussed,

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1 Obi, The Ibo law of property (1963) p.187.

2 Hartland, Primitive law (1924) p.114.

that one of the functions of the bride price is to determine the question of the affiliation of children.

Rights of the widow in respect of the estate of her deceased husband

It is a rule of the customary law most strictly observed that a widow cannot inherit any property from the intestate estate of her deceased husband<sup>1</sup>. Though some informants have sought to justify the position, as we shall see, on the ground that the rule operates to remove any temptation on the part of the widow to bring about the death of her husband, the true rationale of the rule would seem to lie in the practice of exogamy; as well as in the principle of succession based on blood relationship with the propositus. Now, a wife and her husband must belong to different families. Thus, in the Yoruba case of Sogunro Davies v. Sogunro and ors.<sup>2</sup>, in which a widow, married under the Marriage Act, unsuccessfully

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- 1 See: Roth, Great Benin (1903) p.97; Thomas, "Marriage and legal customs of the Edo-speaking peoples" (1910) 11 J. Comp.Leg. (N.S.) 94, at p.100; Omoneukanrin, Itsekiri law and custom (1942) p.74; Egharevba, Benin law and custom (1949) pp.38 and 76; Esenwa, "Marriage customs in Asaba Division" (1948) 13 Nigerian Field 71, at p.80; Okojie, Ishan native laws and customs (1960) pp.92-3; Obi, The Ibo law of property (1963) chap.8, esp. pp.159 and 173. Cf. In the Estate of Agboruja - Urhobo case - (1949) 19 N.L.R.38.
  - 2 (1929) 9.N.L.R.79;

claimed her deceased husband's share in his family property<sup>1</sup>, Berkeley, J., adverted to the position of a customary widow and observed:

"In an intestacy under native law and custom the devolution of property follows the blood. Therefore, a wife or widow, not being of the blood, has no claim to any share." (2)

Care must be taken, however, to distinguish between the widow's legal title to property left by her deceased husband and her rights of possession and enjoyment of provisions that may have been made for her by her husband during his lifetime; her living accommodation and farm land, for example. This point has already been mentioned in chapter six, where we examined the duties of the administrator. It will, however, be treated again, at greater length, in chapter twelve, where the rights and duties of the heir will be considered. For the present, it is enough to say that, though excluded from the scheme of inheritance, she is not without some other rights. Witness her right to continued use of her residential accommodation provided by her husband, regarding which a learned author writes:

"... the widow has an unassailable right to reside in the house .....She retains this right till death, re-marriage or return to her people." (3)

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1 On the ground, as will be illustrated later, that no member of the family had a separate interest therein.

2 Ibid, at p.80.

3 Obi, op.cit., p.173.

The other aspect of the status of the widow

The error into which some of the writers have fallen in ranking a widow as her husband's inheritable property stems from their failure to see that aspect of her status, which she enjoys in her own family. They seem to have completely lost sight of the fact that she is also the child of some parents, who take an interest in her welfare; to whom she may look for protection in the event of her being ill-treated by the members of her deceased husband's family; and from whom she may inherit property.

This aspect of the status of the wife under customary law has been clearly brought out by Green, who has also contrasted it with her position in her husband's family, in this way:

"A woman in her birthplace has a feeling of superiority that she lacks in her husband's village. There she has been acquired by payment: in her own place she is a native of the soil...."(1).

And even Coker who, it will be recalled, regards a wife as part of her husband's immovable property, has noticed this other aspect of her status. He writes:

"It should also be borne in mind, however, that in her own family, the wife is still the daughter or the sister. This fact should not be overlooked, for as a child of her parents, she continues to enjoy all the privileges

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1 Green, Ibo village affairs (1947) p.164.

which by native law and custom attach to children<sup>1</sup>."

Purpose served by the custom whereby the widow is taken over

Whatever may be said against the custom whereby the deceased's heir or successor takes the widow as wife, there is little doubt that it was probably the most effective method in the traditional society of providing for her and her children, if any.<sup>2</sup> It certainly enables

1 Coker, op.cit., p.39.

2 See Kayamba, H.M.T., "The modern life of the East African native" (1932) 5 Afr. 50 at p.53, where he says: "This system has its beneficial use in Africa. It is part of the communal system which has not made room for poor people who depend on the community to support them". Also: Thomas, (1910), pt.1, p.64; Thomas, (1910) 11 J. Comp. Leg. (N.S.) 94 at pp.99-100; Adam, L., "Inheritance in primitive cultures" (1934-5) 10 IOWA L.R. 762 at p.777; Childs, S.H., "Christian marriage in Nigeria" (1946) 16 Afr. 238 at p.244; Meek, Land tenure and land administration in Nigeria (1957), p.187; Okojie, op.cit., p.118. There is biblical support for the custom: "...the wife of the dead shall not marry without unto a stranger: her husband's brother shall go in unto her, and take her to him to wife..." Deut. XXV: 5. And, judicial authority is not lacking: In the Estate of Agboruja (1949) 19 N.L.R. 38 at p.39, where Ames, J., said: "The custom is based on what might be called the economics of one kind of African social system, in which the family is regarded as a composite unit. There can be nothing intrinsically unfair or inequitable..."

a widow to live a normal married life in close association with her children whom she would naturally be reluctant to leave behind even where she may be free - without the necessity of refunding part of the bride price - to return to her own family.<sup>1</sup>

The custom is, however, becoming less popular, especially among the educated elements who are not usually favourably disposed to marrying a 'secondhand wife'; but rather one of their own choice<sup>2</sup>. To the uneducated and poor people, however, such a distinction - between a woman formally married and a widow taken as wife - does not seem to matter, since the observance of the custom may well be the only avenue open to them for ever affording to get married.<sup>3</sup>

(ii) Children and other dependants

During his lifetime, the deceased exercised certain rights or authority over his children and others, to whom he stood in loco parentis. For example, he had a right to the personal services of his children and other dependants; and was, in addition, entitled to receive the

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1 Childs, loc.cit.; Meek, Law and authority in a Nigerian tribe (1937), p.321; Okojie, Ishan native laws and customs (1960), p.102.

2 Esenwa, loc.cit.

3 Okojie, loc.cit.

whole or part of the bride price paid in respect of the marriage of any of his daughters<sup>1</sup>.

## 2. Liabilities of the estate

The discussion of the liabilities of the estate left by the deceased must await a consideration of the rights and duties of his heirs, without which no worthwhile examination of these liabilities can be undertaken. For the present, however, it may be observed that customary inheritance is not limited to the taking of property left by a deceased person; but it is very much concerned also with the assumption of any duties and obligations he may have had. If, for instance, the estate is insolvent and huge debts stand to be paid, the deceased's heirs will be more occupied with the discharge of obligations than with the acquisition of property.

The Ishan custom on this point has been admirably stated as follows:

"Assets and liabilities were in Ishan custom inheritable,"<sup>2</sup>  
And Harris's account of the position among the Ibo is to the same effect when he says:

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1 Thomas, (1910) 11 J.Comp. Leg. (N.S.) 94 at p.97; Omoneukanrin, op.cit., p.41; Hubbard, The Sobo of the Niger Delta (1948), p.191; Bradbury, The Benin kingdom (1957), pp.49, 80, 121 and 156; Lloyd, "The Itsekiri" in The Benin kingdom, ed. Bradbury, p.190; Okojie, op.cit., pp.91, 103 and 118.

2 Okojie, op.cit., p.92.



"Upon the death of a debtor, responsibility for repayment passes to his inheritor, as right to collect a debt passes to the inheritor of the creditor". (1)

The need for stressing this negative aspect of inheritance (i.e. the liabilities of the estate) is becoming greater today with the growing tendency observable whereby succession is treated solely as a source of acquiring rights; and the corresponding duties and obligations it also imposes are readily ignored.

(1) Time for the distribution of the estate

There is no uniformity among the peoples of the Region as to the special length of time that must elapse before the estate is formally distributed. Much, however, depends on how soon the task of administration of the estate is completed; for it is the rule that no distribution is normally undertaken until the performance of the deceased's burial and funeral - a most important part of the administration - is carried out.<sup>2</sup>

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1 Harris, J.S., "Some aspects of the economics of sixteen Ibo individuals" (1944) 14 Afr. 302 at p.320.

2 Thomas, Anthropological report on the Edo-speaking peoples (1910), pt.1, p.76; Thomas, Anthropological report on Ibo-speaking peoples (1914), pt.IV, pp. 128 ff; Thomas, "Notes on Edo burial customs" (1920) 50 J.R.A.I. 377 ff., esp. at pp.404-5; Talbot, vol.III, op.cit., pp.486-7; Welch, "The Isoko tribe" (1934) 7 Afr. 160 at p.172; Omoneukanrin, op.cit., p.73; Egharevba, Benin law and custom (1949), pp.73-4; Bradbury, The Benin kingdom (1957), pp.50, 80, 98 and 152; Okojie, op.cit., pp. 64 ff; 90-1, 124 and 127.

Even when all that pertains to the task of administration has been scrupulously observed, circumstances may still make it inadvisable or imperative for the distribution to be put off till some future time. If, for instance, all or a majority of the heirs are still too young to be entrusted with the management of the inherited property, the distribution is usually postponed until they come of age<sup>1</sup>. Similarly, if the heirs get on well together, they may agree to enjoy the inherited property in common; leaving till some indefinite date the question of its formal and rigid division<sup>2</sup>.

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- 1 Thomas, (1910), pt.1, op.cit., pp.68,72,78-9,84-6; Thomas,(1914), pt.IV, op.cit., pp.120, 133-5; Talbot, vol.III, op.cit., p.686; Omoneukanrin, op.cit.,p.74; Bradbury, op.cit., pp.107 and 137.
  - 2 Thomas, (1910), pt.1, op.cit., p.75; Bradbury, ibid., p.96. Such an arrangement to enjoy the inherited property in common is usually made in respect of land. Such an arrangement may be termed "allocation" in contradistinction to "partition", where the property is rigidly and formally divided or carved out into shares. "Allocation", which is made according to need, still leaves the ultimate title to the property vesting in the group of heirs; while rigid division- "partition" - gives every joint-heir his separate title to his share. See: Coker, Family property among the Yorubas (1958) chaps. 5 and 6, and the judicial authorities cited therein; Lloyd, "Some notes on the Yoruba rules of succession" [1959] J.A.L.7 at p.15; Lloyd, Yoruba land law (1962) pp.285-6.

On the other hand, the division of the estate may occur far earlier than would have normally been the case where the circumstances of the heirs and/or the nature of some of the rights to be inherited or taken over<sup>1</sup> dictate a more expeditious course of action. It hardly requires any argument to say that a group of needy heirs would find more difficulty in resisiting the temptation of the earliest possible distribution, with the attendant benefits, than a group of heirs comparatively well off. The division of the estate is also hastened where it comprises a substantial amount of perishable goods, such as harvested crops and vegetable foods. But, perhaps, the best example of how the nature of the rights to be inherited or taken over<sup>1</sup> may advance the time for the distribution of the estate is furnished by the custom found among the Etsako,<sup>2</sup> Urhobo<sup>3</sup>, Itsekiri<sup>4</sup> and, to some extent, Ishan<sup>5</sup>, under which the wives of the deceased are

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- 1 The inheritance of the deceased's rights over his wives is, as will be shown later, incorrectly referred to as "widow-inheritance".
  - 2 Thomas, Anthropological report on the Edo-speaking peoples (1910), pt.1, p.75.
  - 3 Thomas, ibid, p.88.
  - 4 Omoneukanrin, Itsekiri law and custom (1942) p.73. The rationale of this custom has been given by the author as "nature did not seem to favour undue delay".
  - 5 Okojie, Ishan native laws and customs (1960) p.118.

usually taken over<sup>1</sup> by some of his male relatives prior to the actual time for the distribution of the estate.

(2) Machinery of distribution of the estate

Like the process of administration discussed in the preceding chapter, the distribution of the estate is a matter for the members of the family of the deceased; and, unless there is a dispute in the succession, it does not require the intervention of the court. The rule is that at the end of the period of administration, there is held a family meeting at which the elders of the family supervise the distribution<sup>2</sup>.

In practice, however, only the estate of a man survived by children born of different mothers is usually subjected to formal and rigid division, and to supervision undertaken by the family. Such supervision is carried out in this case "in order to prevent disputes between half-brothers"<sup>3</sup>, since jealousy between half-brothers and

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1 The inheritance of the deceased's rights over his wives is, as will be shown later, incorrectly referred to as "widow-inheritance".

2 Thomas, (1910), pt.1, pp.67 and 86; Bradbury, op.cit. pp.47,77,99, 104, 107 and 152; Omoneukanrin, op.cit. pp.72-3; Egharevba, op.cit. pp.38 and 74; Okojie, op.cit. pp.90-92; Meek, Law and authority in a Nigerian tribe, (1937) pp.124 and 324; Green, Land tenure in an Ibo village (1941) p.14.

3 Meek, op.cit., p.324.

half-sisters is a feature of a polygamous society<sup>1</sup>. In the case of an estate of a man survived by children born of one woman and that of a deceased woman, it is usual for the children to appropriate the property among themselves, without the need for invoking the supervision of the family. This is because there is unlikely to be insistence on rigid division - a fruitful source of quarrels and disputes in matters of inheritance<sup>2</sup>.

(3) The seniority of children

It may seem somewhat illogical for a discussion of the rule relating to the seniority of children to precede those governing legal paternity and their inheritance rights. It is, however, considered that since the various systems in the Region have uniform rules in respect of the seniority of children, the opportunity may well be taken at this stage, to outline these rules; in order to avoid a repetition in the subsequent examination of the various rules governing both the legal rights over children

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1 Meek, op.cit. p.324. Cf. Leith-Ross, African women (1938) p. 226; Green, op.cit. pp.13-14; Ardener, E.W. "The kinship terminology of a group of southern Ibo" (1954) 24 Afr. 85, at p.88.

2 Meek, op.cit., p.324, Green, op.cit., p.14.

and their inheritance rights in respect of their parents' estates.

Unlike the position obtaining among some of the indigenous peoples of Africa south of the continent<sup>1</sup>, the seniority of children throughout our area of reference (i.e. the whole of southern Nigeria) is not determined by the status of their mothers as great or special wives. The eldest child is the son or daughter actually born first irrespective of the status of the mother as the first or last wife according to the sequence of marriage, or as the wife best favoured by the husband.<sup>2</sup> As an author puts it: "... the eldest son is not necessarily the son of the head wife..." (3)

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- 1 The Tswana, for example, see: Schapera, I., A handbook of Tswana law and customs (1955), pp.14-15 and 232. And see generally: Whitfield, G.M.B., South African native law (1948) chap.6, esp. pp.306, 351 and 360 ff; Kerr, A.J., The native law of succession in South Africa (1961), chaps. 2 and 3.
  - 2 Thomas, Anthropological report on the Edo-speaking peoples (1910), pt.1, p.70; Thomas, Anthropological report on Ibo-speaking peoples (1914) pt.IV, p.127; Okojie, Ishan native laws and customs, p.119; Obi, The Ibo law of property (1963) pp.156 and 177; Green, Land tenure in an Ibo village (1941), p.12.
  - 3 Thomas, Anthropological report on Ibo-speaking peoples pt.IV, p.127.

## CHAPTER EIGHT

### RULES OF DISTRIBUTION IN TYPE "A" SOCIETIES - ISHAN AND HOLDERS OF HEREDITARY TITLES AMONG THE BINI

The rules of distribution will be discussed in relation to the estates of the following persons:

- (1) a married man survived by male issue;
- (2) a married man with no male issue;
- (3) a married woman; and
- (4) an unmarried person.

(1) The estate of a married man survived by male issue

The customary law of succession of the Ishan as well as that which governs the devolution of the estates of hereditary title-holders<sup>1</sup> among the Bini is based upon one

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1 The hereditary titles include those of (a) the Oba of Benin; (b) the Uzama Nihiron (the seven Councillors of State or kingmakers); (c) two titles - Elema and Ogiave - associated with (b) above; (d) about three of the roughly fifty Eghaevbo nobles ("Town" and "Palace" chiefs); (e) a few of the Egie-ebo or priestly chiefs; and (f) the enigie or district heads. On these, see: Roth, Great Benin (1903), chap.9, and the authorities cited therein; Roth, "Notes on Benin customs" (1898) 11 Internationales Archiv für Ethnographie, 235 at p.239; Anon, "Notes on the form of the Bini government" (1904) 4 Man, 50 at p.52; Rumann, W.B., "Funeral ceremonies for the late ex-Oba of Benin" (1914) 14 J.A.S. 35 at pp.36-39; Talbot, The peoples of southern Nigeria (1926), vol.1, chap.4; vol.III, chap. 24; Egharevba, Benin law and custom (1949), chap's . 7, 8 and 11; Egharevba, A short history of

fundamental principle, which may be formulated as follows: the eldest surviving son succeeds to all his deceased father's estate as sole heir.

Thus, the Ishan law has been stated in these words: "The first son inherited the father's property....."<sup>1</sup> And the revelant Bini law applying to the estate of a holder of a hereditary title has been summarised as follows:

"When any person of condition dies, the eldest son is sole heir." (2)

The all-embracing inheritance rights of the eldest surviving son of a deceased hereditary title-holder among the Bini has recently been judicially pronounced upon in the case of Iyamuse Ehigie v. Gregory Ehigie<sup>3</sup>, where, however, the court over-stated the Bini principle

1 (p.282)..... Benin (1960), pp.1-66, 76-80; Bradbury, "Some aspects of the political organisation of the Benin kingdom" (1952) 1 W.A.I.S.E.R. conference, 50 at pp.53-60; Bradbury, The Benin kingdom (1957) pp.34-43 and 56.

1 Okojie, op.cit., p.90.

2 Roth, Great Benin, (1903) p.97, quoting Nyendaël; see also: Talbot, op.cit., vol.III, pp.684-685, and the authorities quoted therein; Egharevba, Benin law and custom (1949) pp.37-8; Cardi, op.cit., p.453.

3 [1961] All N.L.R.842; [1961] W.N.L.R.307.



of primogeniture or total succession; and sought to extend it to the succession of non-holders of hereditary titles. In that case, the parties were the eldest son and the eldest daughter of a deceased male dying intestate, leaving inter alia, a house, the subject-matter of the dispute. The defendant (the eldest daughter) had challenged the right of the plaintiff (her eldest brother) to inherit the house in dispute on the ground that their deceased father had built it specially for her to inherit. She occupied the property and refused to give up possession to the plaintiff. Thereupon, the plaintiff sued at the grade "A" customary court, Benin, claiming a declaration of title; or alternatively, that he was entitled to the house as against the defendant under Benin customary law.

Without receiving any evidence of the Benin customary law of succession<sup>1</sup>, the president of the customary

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1 A point on which he was reversed on appeal (High Court). See [1961] All N.L.R.842 at p.848; [1961] W.N.L.R.307 at p.312. For an earlier case in which he was reversed on an identical point by another High Court Judge, see Edokpolor v. Idehen [1961] W.N.L.R.11 at p.14. There, the president specifically refused to accept evidence of the relevant customary law on the ground that "this is a customary court and the court is a repository of Customary Law.... Just as evidence of English law is not required in English Court so there is no need for evidence ... as to the existence or non-existence of Customary Law in Customary Courts of the Western Region": ibid., at p.13.

court - himself a Bini<sup>1</sup> - proceeded to give judgement for the plaintiff. His statement of the Benin customary law of succession, which the present writer's investigation has proved to be unnecessarily too wide, was as follows:

"It is one of the fundamental principles of Benin customary law of succession that the eldest male child of a deceased person who performs all the customary funeral ceremonies at the burial of his deceased father succeeds his deceased father as heir and inherits his properties except that which he gave away before his death." (2)

The principle of primogeniture: reasons for its existence among the Ishan and Bini hereditary noblemen

As will be seen later, the principle of primogeniture characteristic of the Ishan customary law of succession and which also governs succession to the estates of holders of hereditary titles among the Bini is in marked contrast with the systems found among the other indigenous peoples of the Region.

As regards the position among the Bini, an explanation for this divergence may be found in Benin history, and especially in the power formerly wielded by the

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1 He is one of the present writer's informants on the Benin law of succession.

2 [1961] All N.L.R. 842 at p. 845; [1961] W.N.L.R. 307 at p. 309.

ruler, the Oba<sup>1</sup>, together with the mode of succession to the ruler's title; under which the eldest surviving son succeeds to his father's title and property to the exclusion of all others<sup>2</sup>. As a learned author has observed:

"The fact that the crown descended to the eldest son may have influenced local ideas, but primogeniture is not the basis of inheritance in West Africa" (3)

- 1 On the formerly absolute powers of the Oba, see generally: Roth, (1903) pp.101,103 and 111, and the authorities quoted therein; Thomas, (1910), pt.1, p.91; Talbot, op.cit., vol.III, pp.584 and 700; Punch, C., "Land tenure and inheritance in Yoruba", in Great Benin (1903), ed. Roth, p.XXII; Egharevba, A short history of Benin (1960) pp.5,81-88; Bradbury, The Benin kingdom (1957) pp.41-2 and 44.
- 2 On this see: Roth, (1898) 11 Internationales Archiv für Ethnographie, p. 235; Cardi, "A description of the natives of the Niger Coast Protectorate" in West African studies (1899), ed. Kingsley, M.H., p.451; Anon, "Notes on the form of the Bini government", (1904) 4 Man. 50 at p.52; Dennett, R.E., At the back of the black man's mind (1906), pp.176-7 and 180; Rumann, loc.cit.; Talbot, op.cit., vol.1, chap.4; vol.III, chap. 24; Egharevba, Benin law and custom (1949), pp.24,27,36-37; Egharevba, A short history of Benin (1960), pp.7 ff; Roth, Great Benin (1903) pp.100-101, and the authorities quoted therein; Bradbury, (1952) 1 W.A.I.S. E.R. confr., 50 at p.60; Bradbury, The Benin kingdom (1957) pp.35, 40-41.
- 3 Roth, (1903) p.101. Cf. Punch, ibid, who says: "It may well be that the centralisation of all proprietorship in the king may have altered the usual customs in West Africa".

The occurrence of this principle of succession among the Ishan cannot be explained solely on their Benin origin for, as has already been noticed, most of the peoples of the Region originally came from Benin. A more satisfactory reason may be found in the common general features existing between the Bini and Ishan in language, culture and traditions. Thus, Okojie, himself an Ishan, says:

"All Ishans came directly and indirectly from Benin as could be seen from the uniformity of features, language, customs, etc., akin to Benin." (1)

But the position among the Ishan in this regard is rendered more difficult of explanation by the fact that the scope of the principle of primogeniture is broader - it covers the succession of all male persons - than it is among the Bini from whom it must have been adopted. Here is an excellent example of the truth in the observation made by a learned author that "legal historians have not found any universally common origin to the law of succession; nor does that branch of the law seem to have developed in different systems along uniform lines." (2)

Another, and perhaps better, explanation for the Ishan extension of the scope of this principle of succession may have been the traditional case of trying to be

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1. Okojie, Ishan native laws and customs (1960), p.30.  
 2. Parry, D.H., The law of succession, 4th edn. (1961), p. 1.

"more royal than the king himself". This tendency among the Ishan has been noticed by a learned author, himself an Ishan, who says:

"Ask most Ishan men in Lagos where they come from and they would automatically say 'Benin'". (1)

Failure on the part of the eldest surviving son and sole heir to perform the burial and funeral ceremony of his deceased father: legal consequences

The failure of the eldest surviving son and sole heir to carry out the burial and funeral rites of his deceased father does not debar him from inheriting the latter's estate. But, if he wishes to have more than a mere life interest in the inherited property, he must perform the rites some time before his death. Should he die without having performed them, the inherited property passes not to his eldest surviving son, but to his next younger brother<sup>2</sup>. If, however, he had improved the property during his enjoyment of it, his eldest surviving son will be entitled to some compensation from the younger brother inheriting it.<sup>3</sup>

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1 Okojie, op.cit., p.41.

2 Egharevba, Benin law and custom, p.39; Bradbury, (1957), p.77; Okojie, op.cit., pp.63,68 and 126; Talbot, op.cit., vol.III, p.590; Iyamuse Ehigie v. Gregory Ehigie, ibid.

3 Egharevba, loc.cit.

The position of the deceased's younger sons

As sole heir, the eldest surviving son is legally entitled to keep all the property he has inherited. In practice, however, he usually gives some share of the estate to his younger brothers, and even sisters; since all the children participate in the performance of their deceased father's burial and funeral. His, however, is a moral rather than legal obligation<sup>1</sup>; and he normally will not give any worthwhile share to any of the younger children who has not substantially contributed towards the expenses of the burial and funeral of their deceased father<sup>2</sup>. This Benin practice has been specifically referred to, with approval, in Ehigie's case<sup>3</sup>, where the president of the Benin grade "A" customary court observed:

".... it is the usual practice for the eldest male child.. to... give his brothers and sisters who have made satisfactory substantial contribution to the burial some share of the property. He has a discretion in the matter". (4)

Similarly, the sole heir among the Ishan usually

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1 Roth, (1903), quoting Nyendaël who says: "He bestows no more on his younger brothers than what out of his bounty he pleases." Also, Cardi, op.cit. p.452, where he states: "He is expected to act liberally with his younger brothers; but there is no law on this point." See further: Thomas, (1910), pt.1, p.66; Egharevba, (1949), pp.37-8; Talbot, op.cit., vol.III, p.686; Ehigie's case, ibid.

2 Okojie, op.cit., p.90; Ehigie's case, ibid.; Egharevba, (1949), pp.38, 72-3.

3 [1961] All N.L.R.842; [1961] W.N.L.R.307.

4 [1961] All N.L.R.842 at p.845; [1961] W.N.L.R.307 at p.309

distributes some part of his inherited property among those of his brothers who have helped with the performance of the burial and funeral rites of their deceased father<sup>1</sup>.

The reasons underlying this practice are the eldest son's desire to maintain harmony and co-operation within the family; and the advisability of rewarding those younger children of the deceased who have joined in making his burial and funeral a successful and grand affair. A learned author puts the point in this way:

"In practice though the first son would be within his rights to inherit everything without sharing with any of his brothers, for the sake of peace and harmony in the family, he and he alone gave something reasonable to some of his brothers. It also paid him to do so, for during the burial ceremonies of their father all those who had or expected something in the way of inheritance were bound to assist him with money, goats or even cows.."1

#### No principle of representation

We have consistently employed the additional adjective "surviving" in referring to the eldest son because we wish to stress the fact that it is the eldest son actually alive at the time of his father's death who inherits; and that where an eldest son predeceases his father, the former's eldest son - the deceased's grandson - is not an heir in his father's stead<sup>2</sup>. In other words,

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1 Okojie, loc.cit.

2 Implicit in the following authorities: Roth, (1903), p.97; Talbot, op.cit., vol.III, pp.684-6; Thomas, (1910), pt.1, pp.66-7, 78-80; Egharevba, (1949) p.38; Bradbury, (1957), pp.46-7 and 77; Okojie, loc.cit.; Ehigie's case, ibid.

the pattern of succession now under consideration knows nothing of the principle of representation found among the Yoruba, under which a grandchild benefits from the inheritance of his grandfather where the father predeceases the old man.<sup>1</sup>

### The deceased's widows

Except for the gift of any property which may have been made by the deceased husband to her, a widow has no inheritance rights in respect of her husband's estate<sup>2</sup>. As if her lack of such inheritance rights is not enough disability, she is generally required to marry her deceased husband's sole heir. But the rules relating to the right of the sole heir to take over his deceased father's authority over the widows differ among the Bini and the Ishan; the rules observed by the former group being more equitable.

Among the Bini, any widow having surviving children for the deceased is at liberty to return to her own family, and to marry any man of her own choice<sup>3</sup>. The rationale

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- 1 On this, see generally: Coker, Family property among the Yoruba (1958), pp.45-6 and 123, and the authorities cited; Lloyd, "Some notes on the Yoruba rules of succession", [1959] J.A.L.7 at p.23; Lloyd, Yoruba land law 1962, p.297.
  - 2 Roth, Great Benin (1903) p.97; Thomas, (1910) 11 J. Comp. Leg. (N.S.) 94 at p.100; Egharevba, Benin law and custom (1949) pp.38 and 76; Okojie, Ishan native laws and customs (1960) pp.92-3.
  - 3 Roth, Great Benin (1903) pp.37 and 97, and the authorities



of this rule is that such a woman is regarded<sup>292</sup> as having fulfilled her part of the contract of marriage, which is that she should bear children to her husband<sup>1</sup>. On the other hand, any widow not having children by the deceased, or whose children all predeceased him, is under an obligation to marry his sole heir or refund part of the bride price paid in respect of her marriage<sup>2</sup>.

If the age and number of the widows to be taken over permit, it is usual for the sole heir to marry only one or two and leave the rest to some of his deserving and eligible younger brothers<sup>3</sup>. Where he is young or the widows are glaringly older than himself, the usual arrangement is for an older relative - the deceased's

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3 ..... quoted; Dennett, At the back of the black man's mind (1906) p.199; Thomas, Anthropological report on the Edo-speaking peoples (1910), pt.1, pp.50 and 68; Talbot, The peoples of southern Nigeria (1926) vol.III, p.685; Egharevba, op.cit., pp.38 and 76; Bradbury, The Benin kingdom (1957) p.47. Egharevba states that a widow refusing to marry must refund the whole of the bride price. It is submitted, however, that in view of the decision in the Kwale (Ibo) case of Okaludo v. Omama [1960] W.N.L.R.149, the bride price refundable will diminish according to the duration of the marriage between the widow and the deceased.

1 The present writer obtained this from an informant, Obaseki, J. - a Bini - formerly president of the grade "A" customary court, Benin.

2 See footnote 3 on p.291.

3 Egharevba, op.cit., pp.38 and 76.

younger brother, for instance - to marry the women on the understanding that he thereby assumes the responsibility of providing the heir with at least one wife of suitable age when the minor comes of age<sup>1</sup>.

The Ishan rule on this point makes no distinction between the obligation to marry attaching to the childless widow and that borne by the widow, who has surviving children by the deceased: both categories are taken over by the sole heir on pain of their having to refund part of the bride price<sup>2</sup>. If the widow is, however, the daughter of a local potentate, the onogie, she is free to decide whether or not to marry her deceased husband's sole heir<sup>3</sup>. The reason for this exception is that her ~~father~~ who marries without having to pay any bride price, does not, as a corollary, receive any payment from the husband of his daughter<sup>4</sup>.

As among the Bini, the Ishan sole heir gives some of his younger brothers the choice of taking over some of the widows<sup>5</sup>. Similarly, if there is disparity between

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1 Thomas, (1910), pt.1, p.68.

2 Thomas, (1910), pt.1, pp.79-80; Bradbury, (1957), p.80; Okojie, op.cit., pp.91 and 102.

3 Okojie, op.cit., pp.91 and 102.

4 Okojie, op.cit., p.103.

5 Okojie, op.cit., p.91.

the age of the sole heir and that of the widows, an older relative may, on mutual agreement, marry the women; save that among the Ishan, the heir's own mother will be covered under the mutual arrangement.<sup>1</sup>

Ceremony marking the taking over of the widow

No further bride price is paid by the new husband in respect of his marriage with the widow. He is, however, required to make the customary gifts of money and drinks to the parents or guardian of the woman. This requirement is, however, not a legal one<sup>2</sup>; but is directed at maintaining and fostering the good will implied in the contract of marriage, more of an alliance between the families, rather than a mere union between two individuals. By far the most important requirement of the new marriage, however, is the ceremony at which the new suitor slaughters an animal, usually a goat, at the ancestral shrine of the deceased's family<sup>3</sup>. Until this ceremony is performed, the new suitor and the widow are not recognised as husband and wife<sup>3</sup>.

Among the Ishan, if a widow is not taken as wife in this ceremonial way within three months of her husband's

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1 Thomas, (1910), pt.1, p.80; Okojie, op.cit., p.91.

2 Okojie, op.cit., p.103.

3 Thomas, (1910), pt.1, p.50; Okojie, ibid.

death, she is automatically released from any obligation arising out of her marriage with her late husband<sup>1</sup>.

(2) The estate of a married man without male issue

Daughters normally have no rights of inheritance in respect of their deceased father's estate, since otherwise they may take away property from their own family to the families of their husbands. Thus, a learned author has observed:

"A woman is never allowed to come from her husband's place to inherit her father's property .... In the laws of inheritance, therefore, the woman had no place....."<sup>2</sup>

Where the deceased is the holder of a hereditary title, there is further justification for the exclusion of daughters from the inheritance: women do not, as a rule, aspire to titles; and there is need for the male relative succeeding to the deceased's title to use the inherited property in maintaining his new position and status.

The property, including any titles and offices, of a married man without male issue, therefore, descends exclusively to his full brother<sup>3</sup>, who must not, however,

1 Okojie, ibid.

2 Okojie, op.cit., p.93. Cf. Thomas, (1910), pt.1, pp.66, 78-80; Rowling, Land tenure in Benin Province (1948), para. 65; Bradbury, (1957), pp.47 and 77.

3 Thomas, loc.cit.; Talbot, op.cit., pp.684-6; Rowling loc.cit.; Egharevba, Benin law and custom (1949)p.38; Okojie, loc.cit.

be older than the dead man<sup>1</sup>; unless he happens to be the only surviving relative<sup>2</sup>.

With respect to his actual enjoyment of the inherited property, however, he is expected to be more liberal towards the other members of the family than would be the case where an eldest surviving son succeeds. In particular, informants<sup>3</sup> say, he must give special consideration to the daughters of the deceased, his other younger brothers and any grown-up sons of those elder brothers who have been debarred from benefiting from the inheritance by reason of age. It is usual for him to give the deceased's daughters some of the beads or other articles of feminine use and fancy left by the deceased brother; and to treat any of them remaining unmarried as his own children by providing for them. As regards the deceased's other younger brothers and the sons of his elder brothers, his best course is to waive some of his rights to marry his deceased brother's widows in favour of these relatives.

In respect of any cash coming to such heir by way

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1 Okojie, op.cit., pp.120-1; cf. Bradbury, op.cit., pp.44 and 50. This point has also been confirmed by the Oba of Benin.

2 Okojie, op.cit., p.121; also confirmed by the Oba of Benin.

3 The Oba of Benin and Obaseki, J., formerly president of the grade "A" customary court, Benin.

inheritance, however, the information is that he may keep this<sup>1</sup>; one informant<sup>2</sup> adding that money is a rare commodity to be retained by him for meeting unforeseen demands, the refund of the bride price following the dissolution of the marriage of any of the deceased's daughters, for example.

Failing a full brother, the succession passes exclusively to the nearest paternal oldest male relative (generally not older than the deceased) - a half-brother, uncle, nephew, cousin, etc., in that order of preference<sup>3</sup>.

When an eldest surviving daughter may be a successor -  
the Ishan arebhoa

Among the Ishan, the deceased may alter the course of this male-biased pattern of succession by making his eldest daughter an arebhoa (also referred to as arhewa) when she then ranks as a son and inherits to the exclusion of anyone else<sup>4</sup>.

Briefly, under this custom, a man having only

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- 1 The Oba of Benin and Obaseki, J., formerly president of the grade "A" customary court, Benin.
  - 2 Obaseki, J.
  - 3 Thomas, Anthropological report on the Edo-speaking peoples (1910), pt.1, p.66; Okojie, op.cit., p.90.
  - 4 Thomas, (1910), pt.1, p.79; Thomas, (1910) 10. J.A. S.1, at pp.7-8; Thomas, (1910) 11 J. Comp.Leg.(N.S.) 94 at p.99; Rowling, op.cit., para.65; Bradbury, The Benin kingdom (1957) p.80; Okojie, op.cit., pp.88, 93 and 118.

daughters may declare the eldest one an arebhoa. Such an eldest daughter is not given in marriage but remains in her father's house, where she entertains her lover or lovers; and bears children, who belong to her father, the eldest surviving male among whom takes over the property inherited by the arebhoa (their mother) from their maternal grandfather. It will have been noticed that although a woman has been accorded inheritance rights in this case, "she and all the property did not leave the family"<sup>1</sup>. The reasons for the existence of this custom - which is now dying out <sup>1A</sup> have been given as the Ishan anxiety to perpetuate the family; and the need to retain property within the family, and especially to prevent it from being "seized" by the traditional rulers (enigie) on failure of male issue.<sup>2</sup>

Where there are no male surviving relatives: rights of the ruler - Oba or onogie

The property of a man dying without leaving any known male relatives belongs to the local ruler: the Oba or onogie<sup>3</sup>. It should, however, be pointed out

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1 Okojie, op.cit., p.93.

1A Rowling, loc.cit.; Okojie, op.cit., pp.89-90.

2 Okojie, op.cit., pp.88, 93-4.

3 Roth, (1903)p.97; Thomas, (1910), pt.1, pp.67 and 82; Talbot, op.cit., vol.III, pp.685-6; Egharevba, (1949), p.33; Okojie, op.cit., pp.94 and 122.

that as the village is organised on a kinship basis, it is extremely unlikely to find the case of a man who is not survived by male relatives - blood or "incorporated"<sup>1</sup>. In any case, and, as has been aptly pointed out by a learned author, "the property of a man who has no visible heirs is rarely large"<sup>2</sup>.

Under the old Ishan customary law, however, the term "dying without leaving male surviving relatives" had a special and restricted meaning: a man died without leaving a male surviving relative if he left no surviving son; whereupon the chief (onogie) took his property.<sup>3</sup>

#### Who are a man's children?

A man's children, the eldest surviving male among whom normally succeeds him, may be legitimate or legitimated: the former are those born to him by his lawfully married or betrothed wives; the latter are those born to him by unmarried women and in respect of whom he has acknowledged legal paternity, and has paid the necessary compensation to the families of the women

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1 Thomas, (1910), pt.1, p.67; Okojie, op.cit., pp.94 and 122.

2 Thomas, (1910) pt.1, p.68.

3 Okojie, op.cit., p.94.



concerned<sup>1</sup>. It must, however, be borne in mind that a child is nevertheless the legitimate issue of a man to whom its mother was married or betrothed at the time of its conception or, at any rate, its birth notwithstanding that some other man might have been responsible for the biological paternity<sup>2</sup>.

A child born of a woman neither married nor betrothed is an illegitimate issue of its natural father; but a legitimate child of the woman's father or, at all events, of the woman herself<sup>3</sup>. The natural father has no parental rights over such a child; and, conversely, it normally has no inheritance rights in respect of his estate unless he has acknowledged it and settled with the mother's family<sup>4</sup>. Where, however, it is the only child of his putative father, such a child is permitted to inherit from him<sup>5</sup> on the ground that such an unfortunate

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- 1 Thomas, (1910), pt.1, pp.50,65 and 67; Thomas, (1910) 10 J.A.S.1, at p.6; Thomas, (1910) 11 J. Comp.Leg. (N.S.) 94 at p.95; Talbot, op.cit., vol.III, p.427; Egharevba, (1949), p.19; Okojie, op.cit., pp.117-9.
  - 2 Thomas, (1910), pt.1, p.48; Thomas (1910) 11 J.Comp. Leg. (N.S.) 94 at p.96; Okojie, op.cit., p.118; also generally, the authorities cited in footnote 1 above.
  - 3 Thomas, (1910), pt.1, p.50; Thomas, (1910) 11 J. Comp. Leg. (N.S.), 94 at p.96; Talbot, loc.cit.; Egharevba, (1949), loc.cit.; Okojie, op.cit., p.118.
  - 4 Thomas, (1910) 11 J.Comp. Leg. (N.S.), 94 at p.96; Egharevba, (1949) loc.cit.; Okojie, op.cit. p.118
  - 5 Thomas, (1910), pt.1, p.67; Thomas, (1910) 10 J.A.S.1 at p.6.

position is tantamount to an act of God<sup>1</sup>. Sometimes, as among the Ishan, a man may acquire legal paternity in respect of a child born by an unmarried woman to another man, who would not marry her, if the former marries her and pays a rather stiff bride price to cover both the marriage and the legal paternity of the child<sup>2</sup>.

The arebhoa (arhewa) custom found among the Ishan has been considered. It may, however, be recalled that under this custom, the children of the eldest daughter, who was made an arebhoa (arhewa), are affiliated to her father; and not to her lover who has been appropriately described as "merely a biological 'DONOR'".<sup>3</sup>

#### Adopted children

A man not having children of his own may adopt a child, usually a member of his family, to be his heir<sup>4</sup>. The elders of the family give consent to the adoption, which is marked by a ceremony in which an animal - usually a goat - is killed at the family ancestral shrine<sup>4</sup>.

1 Oba of Benin.

2 Okojie, op.cit., p.118.

3 Okojie, op.cit., p.88.

4 Okojie, op.cit., p.90; also generally, Thomas, (1910) pt 1, pp.89 ff; and pp. 65 and 90 where he employs the term "penal adoption" in referring to the traditional method of redress, whereby the murderer or a member of his family was transferred to the family of the murdered man.

The posthumous child: rights of inheritance

Whether a posthumous son may be his deceased father's heir or not depends upon the date of his birth and the time of the distribution of the estate. If he is born before the actual distribution takes place, he is heir provided that he is the eldest surviving son of the deceased. On the other hand, if the distribution occurs before his birth, he is not heir; though the information is that in such a case, the practice is to postpone the distribution till he is born, and born alive.<sup>1</sup> This is done so as to avoid both injustice to such a son and the liability to be divested of the inheritance that may be incurred by an heir who may have succeeded in the mean time.

The picture which has emerged from the foregoing account may now be briefly presented. Barring the case of the adopted child, we may say that the legitimate child acquires his status by the fact that his father has paid either the bride price of the marriage or the fee for the betrothal; while the legitimated child rises to his position by virtue of the natural father's acknowledgement of him as his child, and, above all, by his payment of the necessary compensation to the family of the

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1 Oba of Benin.

mother. The illegitimate child, on the other hand, is one in respect of whom no form of payment has been made and who normally enjoys no rights of succession to his putative father's estate. Indeed, one cannot but agree with the observation of a learned writer, who has stated that bride price "purchases the right to children"<sup>1</sup>.

The attitude of the court to the customary law governing legal paternity

The rules of the customary law relating to legal paternity, including the inheritance rights of the children flowing therefrom, outlined above must be viewed in the light of the statutory provisions governing the judicial enforcement of applicable customary law in general.

The statutory provisions controlling the enforcement of the applicable rules of the customary law are contained not only in the High Court Law<sup>2</sup> and the Magistrates' Courts Law<sup>3</sup>, but also in the Customary Courts Law establishing the customary courts<sup>4</sup>; under which customary law is denied enforcement where it is repugnant to natural justice, equity and good conscience, or is incompatible with any written law for the time being

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1 Jeffreys, M.D.W., "Lobola is child-price" (1951) 10 Afr. Stud. (Johannesburg) 145 at p.146.

2 Laws of the Western Region of Nigeria, 1959, cap.44, s.12.

3 Ibid, cap.74, s.32.

4 Ibid, cap.31, s.19.

in force. There is also the special provision contained in the Evidence Act<sup>1</sup>, which regulates the procedure in the English type courts but not that in the customary courts<sup>2</sup>, by virtue of which a court may reject a rule of the customary law when its enforcement will be contrary to public policy. This provision reads:

"... in the case of any custom relied upon in any judicial proceeding, it shall not be enforced as law if it is contrary to public policy...." (3)

In the case of Edet v. Essien<sup>4</sup>, decided at the Divisional Court at Calabar in the Eastern Region, Carey, J., expressed the view that the custom gearing legal paternity to the payment of bride price, irrespective of the man actually responsible for the biological paternity of a child, would not be enforced by the court (even if established) on the ground that such a custom would offend the repugnancy principle. There, a woman was betrothed to the defendant when she was still a child. Sub-

1 Laws of the Federation of Nigeria and Lagos, 1958, cap.62.

2 Ibid, cap.62, s.1(4).

3 S.14(3). See: Cole v. Akinyele and ors.(1960) V F. S.C.84, where the claim of an acknowledged child under Yoruba customary law was expressly rejected by the Supreme Court of Nigeria on the ground of its being contrary to public policy. He was born to his putative father by a woman other than the wife the putative father had married under the Marriage Act; and during the subsistence of this Christian marriage. The Court did not, however, specifically refer to this section of the Evidence Act.

4 (1932) 11 N.L.R.47.

sequently and with her consent and that of her parents she married the plaintiff; with whom she lived thereafter, and for whom she had two children. The defendant claimed the children on the ground that they belonged to him by customary law, the betrothal fee he paid not having been refunded. The plaintiff sued for the return of the children. Both the Provincial Court and the Divisional Court upheld the plaintiff's claim, and rejected the defence as being repugnant to natural justice, equity and good conscience.

(3) Estate of a married woman

There is no rule that a woman must succeed a woman. A deceased married woman's children inherit her property as joint heirs, the eldest son taking the largest share<sup>1</sup>. Usually, the sons, especially the eldest, take the more valuable part of the estate - money, landed property, etc. - while the daughters share the personal effects, such as clothes, articles of adornment and household utensils.<sup>2</sup>

Where there are no surviving children: rights of her family v. those of her husband

In default of children, a distinction is made

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1 Thomas, (1910), pt.1, pp.68-9; Okojie, op.cit., p.93; Egharevba, (1949), p.39.

2 Thomas, ibid, p.82; Bradbury, The Benin kingdom (1957) p.47.

in respect of the devolution of a married woman's estate, between her ante-nuptial property, which goes back to her family; and her post-nuptial acquisitions which are inherited by her husband or his heir<sup>1</sup>. Egharevba, that generally accepted authority on Benin traditions<sup>2</sup>, has, however, failed to bring out this distinction; and states that the husband always inherits where his wife is not survived by children<sup>3</sup>. His statement of the Benin law is not supported by the Oba of Benin who, however, adds that any property given by the husband to such a wife reverts to him or his heir.

Property inherited by a husband from his wife in the circumstances indicated becomes his in the same manner as if he had personally acquired it; and on his death, is distributed along with his other forms of property in accordance with the rules discussed above.

In the case of a married woman's property reverting to her own kinsmen, the distribution is again carried out on lines similar to those already considered; except that brothers and other male relatives inherit in place of sons, while sisters and other female relatives take in place of daughters.

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1 Thomas, ibid, p.69.

2 See for instance, Legum, C., "Great Benin" (1960) 66 Nigeria 103 at p.105.

3 Egharevba, op.cit., p.38.

(4) The estate of an unmarried person

The rules governing the distribution of the estate of an unmarried person are not dissimilar from those applying to the succession to married persons discussed above. It must be observed that the fact that a person remains unmarried does not necessarily imply that he must die without being survived by children, and legitimate ones too. Enough, it is hoped, has been said in the section on legal paternity to make it clear that celibacy does not constitute an absolute bar to the having of legitimate children. Consequently, an unmarried man may be survived by children whose paternity he may have acknowledged, and in respect of whom he may have made the necessary payments. In the case of an unmarried woman, any children she may have had are her legitimate issue and, probably also, the legitimate issue of her father. The inheritance rights of such children [i.e. those born out of customary wedlock] are, as has been pointed out, clearly recognised.



RULES OF DISTRIBUTION IN TYPE "B" SOCIETIES -IBO AND IVBIOSAKON

The rules of distribution that will be examined are those in respect of the estates of the following persons, namely:

- (1) a married man survived by children born by one wife;
- (2) a married man survived by children born by different wives;
- (3) a married man leaving no male issue;
- (4) a married woman; and
- (5) an unmarried person.

- (1) The estate of a married man survived by children born by one wife

When a married man dies, leaving children of both sexes born to him by one and the same wife, the eldest son inherits to the exclusion of all others; but with the obligation to provide for his younger brothers and unmarried sisters.<sup>1</sup>

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1 Thomas, Anthropological report on Ibo-speaking peoples (1914), pt.IV, pp.127-9 and 143; Talbot, The peoples of southern Nigeria (1926), vol.III, pp.686-7; Basden, G.T., Among the Ibos (1921), pp.32 and 85; Basden, Niger Ibos (1938), pp.267-8 and 277; Meek, Law and authority in a Nigerian tribe (1937), p.320; Jones, G.I., "Ibo land tenure" (1949), 19 Afr. 309 at p.315; Esenwa, F.E., "Marriage customs in Asaba Division" (1948), 13 Nigerian Field 71 at p.80; Forde, D., and Jones, G.I., The Ibo and Ibibio-speaking peoples

This means that he steps into his deceased father's shoes, taking his house, land and other property and, of course, his obligations too. But, as will be shown more fully when we deal with the duties of the heir or successor, he is not obliged to give his brothers and unmarried sisters any specified proportion of the estate. Generally speaking, he keeps the substantial part of the property to himself and, depending on how onerous his legal duty of maintaining the younger ones (as the new head of the family) is, he may distribute the rest of the property among his younger brothers and unmarried sisters in decreasing shares according to their relative ages and the part they played in their father's mortuary rites. One of the reasons for the wide discretion enjoyed by the eldest son in deciding whether to keep all the inheritance, or to give part of it to his younger brothers and unmarried sisters lies in the cohesion possessed by children born of one mother. As a learned author has observed: "...full brothers seldom quarrel with one another on matters of inheritance".<sup>2</sup>

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1 .....(1950), pp.20-21; Chubb, L.T., Ibo land tenure (1961) para. 101; Obi, The Ibo law of property (1963) pp.154-5; Thomas, Anthropological report on the Edo-speaking peoples (1910), pt.1, p.74; Bradbury, The Benin kingdom, p.96.

2 Meek, op.cit., p.324; see also, Green, M.M., Land tenure in an Ibo village (1941), p.14.

The deceased's widow

The deceased's widow, his children's mother, does not inherit from him. Her exclusion from the inheritance is based on the fact that, the pattern of marriage being exogamous, she has not that blood relationship with her deceased husband which, in general, determines who are to be the heirs of a deceased person.

The death of her husband does not automatically dissolve the bonds of the marriage. She is still regarded as the wife of the deceased; and his rights over her are taken over, in this case, by her deceased husband's brother, since no son, of course, marries his own mother.<sup>1</sup>

(2) The estate of a married man survived by children born by different wives

The estate of an Ibo man leaving children born of

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1 Thomas, Anthropological report on the Edo-speaking peoples (1910), pt.1, pp.69-70; Thomas, "Notes on some Ibo burial customs", (1917) 47 J.R.A.I., 163 at p.198; Basden, Among the Ibos (1921) pp.32 and 85; Basden, Niger Ibos (1938) pp.215 and 422; Meek, op. cit., pp.99, 142, 144 and 321; Leith-Ross, African women (1938), pp.93-4 and 102; Esenwa, "Marriage customs in Asaba Division" (1948) 13 Nigerian Field 71 at p.74; Bradbury, op.cit., p.96; Obi, The Ibo law of property (1963), pp.155 and 186.

two or more wives is distributed according to "houses", the sons of each wife constituting a "house" and unit of distribution<sup>2</sup>. The subsequent division of the shares received by individual groups of sons becomes an indoor matter among the sons of each house or wife on considerations of age and need. This point has been vividly made by a learned writer in respect of the division of land among the Ibo, who states:

"In the case of a man who has a number of wives with surviving children his lands are divided into as many shares as there are wives with surviving sons. The share of each of these sub-families is then divided again if need be between the individual sons who compose it." (3)

The position among the Ivbiosakon is similar to that of the Ibo except that a wife having only daughters constitutes a "house" for the purpose of distribution; though the daughters are allowed a share of movable property only.<sup>4</sup>

It will have been observed that, although the wives themselves receive no direct benefits from the intestate

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- 2 Thomas, Anthropological report on Ibo-speaking peoples (1914), pt.IV, p.127; Jones, "Ibo land tenure" (1949) 19 Afr. 309 at p.315; Ardener, E.W., "The kinship terminology of a group of southern Ibo", (1954) 24 Afr. 85 at p.88-89; Ardener, "Lineage and locality among the Mba-Ise Ibo" (1959) 29 Afr. 113 at p.115; Obi, op.cit., pp.156,158 and 176.
- 3 Jones, loc.cit.; see also, Ardener, (1959) 29 Afr. 113 at p.115.
- 4 Thomas, (1910), pt.1, pp.73-5; Bradbury, op.cit., p.97.

succession of the husband, the number of primary shares into which the estate is carved is determined by the number of those of them having surviving children, in the case of the Ivbiosakon; and those with surviving sons among the Ibo. In the latter society, the unenviable lot of a wife having only daughters has been pathetically expressed by a writer thus: "... her door is closed ... her path is lost."<sup>1</sup>

#### The rights of the eldest son

In recognition of his new responsibilities, which will be examined later, the eldest son takes his father's dwelling house<sup>2</sup>, the largest portion of any land that may have been left by his deceased father<sup>3</sup> and, in addition, has a claim to certain specific items of his father's property<sup>4</sup>. These special items of property include such things as the deceased's gun, spear, hat,

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1 Ardener, (1954) 24 Afr. 85 at p.89.

2 Thomas, (1914), pt.IV, pp.127 ff; Rowling, Land tenure in Benin Province (1948) para. 99; Bradbury, The Benin kingdom (1957) p.97; Obi, op.cit., pp.172 ff; Chief H.H.A. Esegie (Ivbiosakon).

3 Thomas, (1910), pt.1, pp.71-4; Meek, op.cit., p.322; Harris, (1944) 14 Afr. 302 at p.326; Jones, "Ibo land tenure" (1949) 19 Afr. 309 at p.315; Ardener, (1954) 24 Afr. 85 at p.88; Green, Land tenure in an Ibo village (1941), pp.12-14; Obi, op.cit., pp.176 ff.

4 Meek, op.cit., p.322; Obi, op.cit., p.176.

walking-stick, etc.; and their being reserved for him is designed to help establish his authority as the new head of the family. It must, however, be stressed that only one article out of a specific item is reserved for the eldest son. It follows that where the deceased father has left two or more of a specific item - say, several guns - the eldest son may claim one only, leaving the others to be distributed along with the other assets of the estate.<sup>1</sup>

When a daughter may inherit as a son - the Ibo custom of idegbe (idebwe)

It is a general rule among the Ibo that a daughter does not inherit from her father. Among the Ibo of the Asaba district, however, a man having only daughters may declare the eldest among them an idegbe (idebwe)<sup>2</sup>, when she then ranks as a son and inherits according to the rules discussed above. It will have been noticed that this custom is the Ibo equivalent of the Ishan arebhoa (arhewa) already considered. Like the Ishan practice, the idegbe (idebwe) is not given in marriage; but lives in her father's house where she entertains her suitor,

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1 Among the Ivbiosakon, however, he is entitled to all articles of dress or personal adornment which the deceased was in the habit of using as everyday wear: Chief H.H.A. Esegie.

2 Thomas, (1914), pt.IV, pp.5, 60-61, 79, 128 and 130-1; Rowling, loc.cit.

and raises children who are affiliated to her father - the idea being for her to pass the inheritance to the eldest son she may eventually have.

The existence of this custom among the Asaba Ibo has been credited to their proximity with the Yoruba of the Western Region, where women enjoy practically the same inheritance rights as men<sup>1</sup>. With respect, it must be pointed out that there is no evidence of a Yoruba custom corresponding to the Ibo idegbe (idebwe), nor does the geographical position occupied by the Ibo justify the contention that they are in close proximity with the Yoruba<sup>2</sup>. In point of fact, and barring the enclave within the Ibo area inhabited by the people of Yoruba stock, whose customs have long been assimilated to those of the Ibo; the area occupied by the Asaba Ibo is farther from Yorubaland than the comparative positions of the other ethnic groups in the Mid-Western Region<sup>2</sup>. Furthermore, this view about the origin of idegbe seems to have lost sight of the fact that an identical custom was detected among a group of Ibo far away in the Eastern Region, by the great missionary pioneer, Basden;<sup>3</sup> and

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1 Obi, op.cit., p.185.

2 See map attached to this work and referred to as appendix 1.

3 Basden, Among the Ibos, (1921) p.76; Basden, Niger Ibos (1938) p.226.

this has been recently confirmed by the committee set up by the Eastern Regional Government to inquire into the custom of bride price<sup>1</sup>. Another author, who investigated the Ibo system, has suggested that the idegbe custom must have spread into the Asaba district from the neighbouring Ishan area, where the similar practice of arebhoa is found<sup>2</sup>. While one may not readily disagree with this eminently sensible suggestion, one must bear in mind the observation of a learned author that "legal historians have not found any universally common origin to the law of succession...." (3)

#### The deceased's widows

It has already been noted that a widow does not inherit from her husband, and that she is required to marry one of his kinsmen. The rules regulating the taking over of the widows are flexible: much, however, depends upon the number of wives; the ages of both the widows and the prospective suitors (i.e. the deceased's sons); and the marital status of the latter. As a general rule, however, the tendency is for the eldest son to take the youngest widow, leaving the older ones (including his

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- 1 Eastern Nigeria Government Printer, Report of the Committee on bride price, (1955) para.62.
  - 2 Thomas, (1914), pt.IV, p.5.
  - 3 Parry, The law of succession (1961), 4th edn., p.1.



mother) for his more mature uncles.<sup>1</sup> But, if the disparity in age does not forbid such a course, the eldest son may give his younger brothers the choice of marrying some of the widows other than their own mothers.

Any widow refusing to marry her new suitor is liable to refund part of the bride price paid in respect of her marriage with the deceased.<sup>2</sup> It matters not whether she has surviving children for her deceased husband or not; and as long as she has not refunded the appropriate amount of bride price, she is still legally the wife of the deceased. The rule stated is subject to local variation among two Ivbiosakon communities, who follow the Bini rule whereby widows having surviving children for the deceased are permitted to return to their own families; without the necessity of having to refund any bride price.<sup>3</sup>

Some of the widows, usually very old ones, may,

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- 1 Thomas, (1917) 47 J.R.A.I., 163 at p.198; Basden (1921) p.85; Basden, (1938), pp.215 and 422; Meek, Law and authority in a Nigerian tribe (1937), pp.99, 142, 144 and 321; Leith-Ross, African women (1938) pp.93-4 and 102; Esenwa, (1948) 13 Nigerian Field, 71 at p.74; Obi, op.cit. p.186.
  - 2 Meek states that some rejected suitors often refrain from demanding the refund of bride price in the hope of laying claim to any children subsequently born to other men by the widows; and that this led to the passing of a bye-law in Nsukka Division to compel such rejected suitors to accept the refund of bride price; Meek, op.cit., p.284.
  - 3 Thomas, (1910), pt.1, p.70; Confirmed by informants, Chief H.H.A. Esegie and Mr C.O. Obadan.

with the approval of the deceased's family, remain in the late husband's house without marrying any of his relatives; and may, acting discreetly and with the acquiescence of the family, have sexual relations with one of the male relatives of the husband, and thus live a normal married life.<sup>1</sup>

#### Ceremony marking widow-marriage

A special ceremony is performed before the new suitor and the widow become husband and wife. The Ivbiosakon follow the Ishan and Bini practice under which the new suitor provides a goat which is slaughtered at the family ancestral shrine<sup>2</sup>; while among the Ibo, it is sufficient if he procures a chicken and/or palm wine for the same purpose<sup>3</sup>.

#### Who are a man's children?

A man's children may be legitimate, such as those born by his lawfully married or betrothed wife during the subsistence of the marriage or binding agreement to

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- 1 Meek, op.cit., pp.284, 321-2; Obi, op.cit., p.187.
  - 2 C.O. Obadan.
  - 3 Meek, op.cit., p.284; Thomas (1917), 47 J.R.A.I. 163 at p.206; Obi, op.cit., pp.186-7.

marry (betrothal)<sup>1</sup>; or they may be legitimated such as those who, though not born legitimate, have nevertheless been acknowledged by him<sup>2</sup>; or, finally, they may be illegitimate, such as the offspring of an irregular union, and in respect of whom he has done nothing towards his recognition of their legal paternity.

A man's heirs are generally his legitimate and legitimated sons. But it must be emphasised that, as a general rule, an adulterine child does not belong to its natural father; he has no claim enforceable at law to take possession of the child, which is affiliated to the lawful husband of its mother<sup>1</sup>. For, as Basden has expressed the point: "The child is born to his [i.e. the lawful husband's] wife, and that is the argument that counts".<sup>3</sup>

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- 1 Thomas, (1914), pt. IV, p.131; Basden, (1921), p.76; Basden, (1938), p.226; Meek, op.cit., pp.97,267 and 283-4; Talbot, op.cit., vol.III, p.427; Harris, (1944), 14 Afr. 302 at p.325; Forde and Jones, The Ibo and Ibibio-speaking peoples (1950), pp.17-18; Green, Ibo village affairs (1947) pp. 70 and 156; Leith-Ross, op.cit., p.103; Ezenwa, op.cit., 71 at p.73; Jeffreys, "Lobola is child-price", (1951) 10 Afr. Stud. (Johannesburg) 145 at pp.146 and 165; Obi, The Ibo law of property (1963), pp.75, 190 -1.
  - 2 Ezenwa, op.cit., 71 at p.73; the Kwale-Ibo case of Jirigho v. Anamali [1958] W.N.L.R. 195, esp. at p.197.
  - 3 Basden, Among the Ibo (1921), p.76; Basden, Niger Ibos (1938), p.226.

From the foregoing discussion, it will have been observed that the legal significance of the payment of bride price in the matter of legitimacy and the affiliation of children is that it establishes the right of the husband to children born by his wife during the subsistence of the marriage; irrespective of the man actually responsible for their biological paternity<sup>1</sup>. This was the reason for the existence of the practice among the Ibo, which is now dying out<sup>2</sup>, whereby an impotent or sick man might permit his wife to have extra-marital relations, in the hope that any resulting children would belong to him by virtue of the bride price he paid in respect of his marriage with the woman concerned.<sup>3</sup>

As regards Ivbiosakon law on this point, however, informants say that the rule gearing legal paternity of a child to the payment of bride price, irrespective of the claims of the biological father, is not generally observed today; on the ground that events have shown that such a child usually leans more towards the family of its natural father than towards that of its legal father<sup>4</sup>.

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1 Bride price has been appropriately described as "child-price": Jeffreys, (1951) 10 Afr. Stud.(Johannesburg), 145 at p.146.

2 No doubt, because people are beginning to realise that children born in such circumstances are more favourably disposed to the family of their putative father.

3 Cf. Esenwa, loc.cit.

4 Chief H.H.A. Esegie and C.O. Obadan.

### A woman's children

A woman's children are, of course, the legitimate issue of her father or guardian, or at any rate, of the woman herself; and this is so whether she is married or single. The legal status of the children of an eldest daughter made an idegbe (idebwe) among the Ibo - they are affiliated to her father - has already been considered.

### WOMAN-TO-WOMAN MARRIAGE: AFFILIATION OF CHILDREN OF SUCH MARRIAGE

Among the Ibo, a barren woman may, if she is rich enough, "marry" a "wife" whom she gives to her husband; and if this second wife bears children, they are regarded as the legitimate children born by the barren wife to her husband.<sup>1</sup>

In the case of a barren unmarried woman, she may contract a "marriage" with a younger girl to whom she subsequently allows a male proxy to have access, the resulting children belonging to the "female" husband<sup>2</sup>.

The custom of woman-to-woman marriage was always officially frowned upon especially when it became known that it was being used as a method of investment by

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1 Thomas, (1914), pt.IV, pp.60, 83, 130-1; Meek, op.cit., p.275.

2 Meek, loc.cit.

"female"husbands, who hired out the young girls married in this way to numerous men on payment of entertainment fees<sup>1</sup>. There is no doubt that the courts will today declare such a custom as being repugnant to natural justice, equity and good conscience.

Judicial attitude to the customary law governing legal paternity

What has been said in connection with the Ishan and Benin rules determining legal paternity, as well as the limitations imposed by the general law on these customary rules, applies with equal force to the relevant Ibo and Ivbiosakon rules<sup>2</sup>. In particular, the custom of woman-to-woman marriage and that by which an impotent or sick husband is enabled to claim the adulterine children of his wives will not find favour with the courts; which will take the view that such customs clearly offend the repugnancy principle<sup>3</sup>, and are also contrary to public policy.<sup>4</sup>

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1 Esenwa, op.cit., 71 at p.74. For the official attitude, see: Lugard, F.D., The Dual Mandate (1929), p.387; noted by Jeffreys, in 10 Afr. Stud.(1951) (Johannesburg) 145 at p.164.

2 See pp. 299-305 for a discussion of the Ishan and Benin rule

3 See: the following statutory provisions: the High Court Law, cap.44, s.12; Laws of the Western Region of Nigeria (1959); the Magistrates' Courts Law, cap.74, s.32, ibid; the Customary Courts Law, cap.31, s.19, ibid.

4 See p.304; also the Evidence Act, cap.62, s.14(3); cf. Cole v. Akinyele and ors. (1960) V F.S.C.84.

As regards the right of the family of the deceased to a child born by his widow to a stranger, however, the case of Amachree v. Goodhead<sup>1</sup>, decided by the Divisional Court at Degema in the Rivers Province of the Eastern Region, would seem to suggest that such a claim will be upheld by the courts. In that case, the question for decision was whether a child, born after the death of her mother's husband to a non-member of his (husband's) family, belonged to the family into which its mother had married; or whether it belonged to the family of its mother, the putative father advancing no claim whatsoever. The background facts were briefly as follows: in 1907, a native court awarded the custody of the child to the chief and head of the deceased husband's family, the respondent in this suit. In 1916, the respondent allowed the child and its mother to visit the child's maternal grandmother and stay with her for a while; but before giving his permission, the respondent obtained a written declaration from the grandmother acknowledging the right of the respondent's family in respect of the child. It stayed with the grandmother for six years at the end of which she refused to return it to the respondent. Thereupon, he sued again in the native court, claiming the recovery

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1 (1923) 4 N.L.R.101.

of the child; and the court restored custody to him.

An application for an order for a writ of habeas corpus in respect of the child, at the time in custody of the respondent, was then made by the sister of the mother to the Divisional Court. It was argued for the applicant that the judgement of the native court amounted to giving judicial recognition to a form of slave dealing transaction; that the document signed by the child's grandmother was worthless as it attempted to place both the child and its mother in a state of servitude; that the mother ceased to belong to the respondent's family and reverted to her own family after her husband's death; and that, in any case, the respondent's claim was repugnant to natural justice.

Berkeley, Ag.J., rejected the argument of counsel for the applicant and dismissed the application; observing that he could not uphold the contention that giving custody to the respondent was "repugnant either to natural law or humanity".<sup>1</sup>

The case of Amehree v. Goodhead<sup>2</sup> must be regarded as having been decided on its special facts. In particular, the written declaration signed by the applicants

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1 Ibid, at p.102.

2 (1923) 4 N.L.R.101.



mother, unequivocally recognising the respondent's right over the child, was enough to conclude matters. That the existence of such a written declaration, coupled with subsistence of two decisions of the native court in favour of the respondent, greatly influenced the judgement of the Divisional Court is evident in the remarks made by the learned judge, when he said:

"On the other hand, the native law and custom on the subject is clearly indicated by the two Native Court decisions and the written admission of the maternal grandmother." (1)

Furthermore, no pronouncement was made on the right of the natural father in respect of the child, if any; he having advanced no claim, as has already been pointed out.

#### The posthumous child: rights of inheritance

The rules governing the inheritance rights of the posthumous son among the Ibo are similar to those already considered in connection with the Bini and Ishan<sup>2</sup>. The only point of difference is that where the posthumous son is the only son of his mother, he constitutes a "house" or unit of inheritance; and inherits as a joint heir<sup>3</sup>.

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1 Ibid, at p.102.

2 Chapter eight.

3 G.C. Onochie, an Asaba Ibo, Customs Officer, Sapele, Mid-Western Region of Nigeria.

Principle of representation

The point falling for consideration here is the place, in the scheme of inheritance, of an eldest son of a son who predeceases the person to whom he would have succeeded. Does the eldest son of such an heir-apparent predeceasing his benefactor take in the former's (his father's) stead under the principle of representation? The Ivbiosakon and Ibo rules differ on this point, and will accordingly be treated separately.

Among the Ivbiosakon, there is no principle of representation; and the eldest son of an heir dying before the person from whom he would have benefited does not inherit in the father's stead. Indeed, one informant has expressed the view that it would be unjust for the eldest son of such an heir-apparent predeceasing his benefactor to take, since that would mean that he inherited twice over: first, he took the whole or substantial part of the estate of his own father, when the latter died; second, he now seeks to inherit the property of the person to whom his father would have been heir had he lived long enough.<sup>1</sup>

As regards the Ibo rule, however, opinions are divided. According to Thomas, who investigated the Ibo

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1 Chief H.H.A. Esechie.

customary law, where the eldest son predeceases his father, the inheritance passes to the next senior surviving son; and not to the eldest son of the deceased son.<sup>1</sup> On the other hand, a recent author has taken the opposite view, which he has stated as follows:

"... where an heir-apparent predeceases the man he was to succeed, his own eldest son .... will succeed in his stead under the principle of representation...(2).. a man is not dead, for the purposes of intestate succession, if he has a son living." (3)

Thomas's account is to be preferred to the view of the recent writer, not only because the former's statement is backed by the result of actual investigation of the customary law; but also because it is supported by the mode of devolution of the Ibo ofọ (a sacred stick symbolic of the authority of the head of the family) again, as recorded by someone who had undertaken field investigation of the Ibo customary law<sup>4</sup>. Besides, considering his age - he belongs to the second generation - it is difficult to see how he could discharge some of the onerous duties and obligations which, as we shall see, succession implies. That the heir in such a case is the next senior son alive receives further support from the fact that, besides succeeding to property, it is

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1 Thomas, Anthropological report on Ibo-speaking peoples (1914), pt.IV, p.219.

2 Obi, The Ibo law of property (1963), p.154.

3 Obi, op.cit., p.157.

4 Meek, Law and authority in a Nigerian tribe (1937), pp.106 and 322.

also customary that he should take over the deceased's wives; and provide maintenance for them as well as for any other dependants of the deceased. The merit in this view is that the fund for maintenance then comes quite naturally from the property inherited by the heir.

(3) The estate of a married man leaving no male issue

In default of sons, the property of a married man goes to the eldest surviving full brother<sup>1</sup>; except that among the Ivbiosakon, such a full brother must not be older than the deceased<sup>2</sup>. The position of the deceased's daughters, especially the eldest one, requires some comment. Among the Ibo, it is a rigid rule, as we have seen, that a daughter has no inheritance rights in respect of the estate of her father, unless the latter makes her an idegbe (idebwe). This rule does not, of course, preclude the full brother who succeeds from giving the deceased's daughters some of the property he has inherited. Among the Ivbiosakon, however, the

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1 Thomas, (1914), pt.IV, p.129; Basden, Among the Ibos (1921), p.32; Basden, Niger Ibos (1938), pp.267-8; Thomas, (1910), pt.1, pp.69 ff; cf. Bradbury, The Benin kingdom (1957), p.97; Green, (1941), p.13; Obi, op.cit., pp.154-9.

2 Bradbury, loc.cit. This is confirmed by informants: Chief H.H.A.Esechie and C.O. Obadan, Esq.

deceased's eldest daughter is entitled to receive some of the beads, livestock and money left by her father<sup>1</sup>.

Failing full brothers, the next heir among the Ibo is apparently the father of the deceased, and not the half-brother<sup>2</sup>. The reason for this preference among the Ibo has been stated as being based on the ground that the old man is thereby afforded the wherewithal to marry another wife; and so found another branch of the family.<sup>3</sup> This view is probably also supported by the Ibo rules of inheritance which, unlike those observed by the Ishan, Bini and Ivbiosakon already referred to, do not exclude from the succession relatives older than the deceased himself<sup>4</sup>. It should, however, be pointed out that this order of preference favouring the deceased's father at the expense of his half-brother may well be reversed if the latter undertakes the performance of the whole or the substantial part of his deceased brother's burial and funeral<sup>5</sup>.

If the deceased is not survived by a father or half-brothers, the succession passes to the nearest

1 Bradbury, loc.cit., This is confirmed by informants: Chief H.H.A. Esechie and C.O. Obadan, Esq.

2 Obi, op.cit., pp.157 and 159.

3 Ibid, p.157.

4 Thomas, (1914), pt.IV, pp.129 and 130; Cf. Obi, op.cit. pp.154-9.

5 Thomas, (1914), pt IV, pp.128-9; cf. Obi, op.cit., pp.154-9.

paternal relative - uncle, nephew or cousin; or even the head of the family<sup>1</sup> - the Ibo rule making no distinction as to whether the inheritor is older or younger than the man he is to succeed.

In the absence of full brothers, the order of preference among the Ivbiosakon is stated to be: half-brothers, uncles, nephews and oldest patrilineal relative of the deceased; who must not, however, be older than the deceased, and who must give a share of the movables (beads, livestock, money, etc.) to the eldest daughter of the deceased<sup>2</sup>.

When a relative older than the deceased may be heir

In one instance, a relative may still be heir of the deceased notwithstanding that the latter was his younger kinsman. This occurs when the order of preference has been observed up to the line of male paternal relatives stretching as far as third cousins; and no eligible heir is found<sup>2</sup>. An older near patrilineal blood relation of the deceased - a father or an uncle, for instance - then takes by virtue of the rule expressed in the maxim "ofede" or "ogbuli"; meaning that, there

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1 Thomas, (1914), pt.IV, pp.129 and 130; Obi, op.cit., pp.154-5 and 159.

2 Chief H.H.A. Esechie and Mr C.O. Obadan.

being no younger kinsman to inherit, the inheritance has rolled on to the older relative.<sup>1</sup>

Where remoter relatives (half-brothers, nephews, etc.) were born of different mothers: principle of joint inheritance.

Where the deceased's remoter relatives, such as half-brothers, nephews and others, are children of the same mother, the eldest among the class of these relatives inherits as sole heir on the lines indicated above. Where, however, they were born of different mothers (as is normally the case in a polygamous or composite family), they take as joint heirs under the principle of joint succession<sup>2</sup> which is observed in the distribution of the estate of a man survived by sons born to him by different women, discussed earlier in this chapter.

Where there are no visible blood relatives

We may repeat what has been said in the chapter on the Ishan and Bini with respect to the destination of the estate of an heirless man; and say that it is exceedingly rare to find the case of a man dying without leaving

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1 Chief H.H.A.Esechie and Mr C.O. Obadan.

2 Obi, The Ibo law of property (1963), p.157.

known relatives and that, in any case, the property of such a man is unlikely to be substantial<sup>1</sup>.

Where a man dies without being survived by any blood relatives, his estate is inherited by the head of his community, the village or town; who also sees to it that the deceased is accorded a burial and funeral befitting his station in life<sup>2</sup>.

(4) The estate of a married woman

The estate of a deceased married woman is inherited by her children as joint heirs<sup>3</sup>. But as the use to which property is put often determines its manner of devolution<sup>4</sup>, articles of clothing and personal adornment and household utensils go to the daughters<sup>5</sup>; while any immovable property and money she may have left are taken by the eldest son, who, however, must provide for his younger brothers and unmarried sisters<sup>6</sup>.

1 Chapter eight, pp.298 and 299.

2 Thomas, Anthropological report on the Edo-speaking peoples, pt.1, p.70.

3 Thomas, (1910), pt.1, p.70; Thomas, (1914) pt.IV, pp.141-3; Basden, (1921), p.90; Basden, (1938), p.208; Meek, op.cit., pp.100, 203 and 323; Chubb, Ibo land tenure (1961), para. 41; Bradbury, The Benin kingdom (1957) p.97; Obi, op.cit., pp. 190 ff.

4 Cf. Lowie, H., Primitive society (1921), p.232.

5 Thomas, (1910), pt.1, loc.cit.; Thomas, (1914), pt.IV, loc.cit.; Meek, loc.cit.; Obi, loc.cit.

6 See generally, the authorities referred to in footnote 5 above; and also the following: Esenwa, (1948) 13 Nigerian Field, 71 at p.80; Jones, (1949) 19 Afr. 309 at pp.315-6; Forde and Jones, The Ibo and Ibibio-speaking peoples, (1950) pp.20-21.



Failing children, any property owned by her before marriage - her ante-nuptial property - reverts to her own family; while any subsequent acquisitions - post-nuptial property - devolve upon her husband or, if he be dead, his heir<sup>1</sup>. Meek, however, also states that the husband always takes in default of children, on the ground that it is only in this way that he is compensated in respect of an unproductive bride price<sup>2</sup>. With respect, this view is not only unsupported by the views of other writers on Ibo law referred to above<sup>1</sup>; but is in direct conflict with the expert evidence given by half-a-dozen chiefs on Onitsha (Ibo) customary law in the case of Nwugege v. Adigwe and anor.<sup>3</sup> decided by the Divisional Court. Besides, the author appears to have contradicted himself when he later on says:

"...purely feminine property would be handed to her [i.e. the childless married woman's] sisters" (2);

a practice which clearly recognises the claim of the deceased woman's relatives to her ante-nuptial property usually represented by such "purely feminine property". It may, however, be observed that the valuables among

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1 Thomas, (1914), pt.IV, pp.142-3; Meek, op.cit., pp.203, 323-4; Chubb, loc.cit.; Obi, op.cit., pp.71 ff, 192 ff; Nwugege v. Adigwe and anor. (1934) 11 N.L.R.134.

2 Meek, op.cit., p.323.

3 (1934) 11 N.L.R. 134.

a married woman's "purely feminine property" are invariably provided for her by her mother either before or at the time of the marriage<sup>1</sup>.

The ante-nuptial property of a deceased woman reverting to her own kinsmen is divided on lines similar to those in respect of the distribution of the estate of a married man leaving no children; except that her articles of feminine use are inherited by her full sister, half-sister or, failing these, her nearest male paternal relation in that order<sup>2</sup>.

Her post-nuptial property devolving on her husband falls into the same category as his personally acquired property; and, on his death, is distributed in accordance with the rules already discussed.

(5) The estate of an unmarried person

(i) Unmarried man

The rules observed in the distribution of the estate of an unmarried man are the same as those applicable in respect of the division of the estate of a married man examined earlier; with the obvious qualification that in the case of the unmarried man, there will, of course, be no widows to be taken over by the heir.

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1 Meek, op.cit., p.267; Leith-Ross, African women (1938) p.102; Green, Ibo village affairs (1947), pp.97 and 161.  
 2 Cf. Obi, op.cit., p.196; C.O. Obadan (Ivbiokakon)

If, in accordance with the rules relating to the legal paternity of children already discussed, an unmarried man is survived by legitimated children, the eldest son or sons among them (depending upon whether the sons were born of one mother or different mothers) will be his heirs.

(ii) Unmarried woman

When an unmarried woman dies, her children, if any, inherit her estate as joint heirs in the same manner as the property of a married woman is divided among her children. If there are no children, the whole of her estate - unlike that of a deceased childless wife, the post-nuptial part of which goes to her husband or his heir - is inherited by the members of her family in accordance with the rules governing the distribution of a childless wife's ante-nuptial property reverting to her own kinsmen.

SYSTEM OF MATRILINEAL SUCCESSION ABSENT AMONG THE IBO OF  
THE MID-WESTERN REGION

The matrilineal system of inheritance found among a group of Ibo inhabiting the Afikpo, Bende and Obubra

Divisions of the Eastern Region<sup>1</sup> is not practised by the Ibo of the Mid-Western Region. The topic is, however, referred to in order to stress the point that the similarity in the rules of inheritance between the Ibo east of the Niger and those west of the river - the Mid-Western Ibo - does not extend to this system of succession.

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1 Under the matrilineal principle of inheritance, a man's heirs are the children of his sisters. For a full account of this system of succession, see: Basden, Niger Ibos (1938) p.268; Jones, "Ibo land tenure" (1949), 19 Afr. 309 at p.315n; Chubb, Ibo land tenure (1961) para. 40; Ottenberg, S., "Double descent in an Ibo village-group", Selected papers of the Fifth International Congress of Anthropological and Ethnological Sciences, September 1956 (Philadelphia), 473 at pp. 478-80; Obi, The Ibo law of property (1963), chap.9; The Eastern Nigeria Government Printer, Report of the Committee on bride price (1955) paras. 251-2. The committee found that the system of inheritance was not popular with the people of one area in Obubra Division; and that the clan council had modified the system by means of a declaration entitling children to inherit from their fathers: ibid, para.252.

## CHAPTER TEN

### RULES OF DISTRIBUTION IN TYPE "C" SOCIETIES - AKOKO-EDO, BINI, [i.e. the majority of the Benin people, not being holders of hereditary titles], ISOKO, ITSEKIRI AND URHOBO General remarks

One of the interesting features detectable in the law of succession in the societies under consideration is the comparatively wide range of relatives having inheritance rights in respect of the various items of property comprised in a deceased person's estate. This means that the benefits of inheritance are not here concentrated upon one class of the deceased's blood relations - be they his children or brothers - but are rather dispersed among his children, irrespective of sex, and his remoter kinsmen<sup>1</sup> on (in some cases) both the paternal

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1 Thomas, Anthropological report on the Edo-speaking peoples (1910), pt.1, pp.85-8; Omoneukanrin, Itsekiri law and custom (1942), p.74; Bradbury, The Benin kingdom (1957), p.152. Welch states that the eldest son among the Isoko is sole heir: "The Isoko tribe", (1934) 7 Afr. 160 at p.172. This is not supported by Thomas and Bradbury, op.cit., and is certainly rejected by an informant, Chief J.A. Akiri, Odion of Uzere. The rules of the Benin customary law are different on this point; and collateral relatives and their descendants do not inherit where there are surviving children. See: Thomas, (1910), pt.1, pp.66-69; Egharevba, Benin law and custom (1949), pp.38, 77-78; Bradbury, loc.cit.

and maternal sides<sup>1</sup>. The bulk of the estate, however, is kept by the children; while, except where the property is substantial, token shares only are given to remoter relatives. The position among the Urhobo has been accurately described by Thomas, who says:

"All sons and all daughters get some share of the property...The brother gets a small share", (2)

As regards the rights of the kinsmen of the deceased to take over his authority over his wives, he writes:

"If there are four wives, two would go to the head son, one to the father's family, one to the mother's family." <sup>3</sup>

The contrast between the inheritance rules briefly indicated above and those obtaining in societies "A" - Ishan and holders of hereditary titles among the Bini - and "B" - Ibo and Ivbiosakon - is striking: for, whereas remoter relatives here inherit some property, albeit precious little, notwithstanding that there are closer kinsmen; in societies "A" and "B", they are, as we have seen, excluded from the inheritance in similar circumstances.

1 Thomas, (1910), pt.1, pp.87-8. This is confirmed by the Ovie of Ughelli, Chief T.E.A. Salubi (Urhobo), and Chief J.A. Akiri (Isoko); the first informant adding that every person is the child of two individuals, each of whom belongs to a family.

2 Thomas, (1910), pt.1, p.86.

3 Thomas, (1910), pt.1, p.87.

Various estates considered

The rules of distribution discussed are those which apply to the estates of the following persons, namely:

- (1) a married man survived by children born of one mother;
- (2) a married man survived by children born of different mothers;
- (3) a married man leaving no children;
- (4) a married woman; and
- (5) an unmarried person.

- (1) The estate of a married man survived by children born of one mother

With the exception of the Bini, among whom remoter relatives are excluded from the inheritance, the estate of a married man leaving children, who are brothers and sisters of the full blood, descends to these children and his other relatives as joint heirs. But, while the children - especially the sons - take the substantial part of the property, such as houses, lands and economic trees; the other relatives share only in some part of the movable property, such as some articles of the deceased's clothing and a little bit of his money. It is, therefore, proposed to examine separately the various rights of these joint heirs in respect of the estate.

Rights of children

It has been pointed out by some informants that, apart from the distribution of their part of the movable property and the handing over of those special items of the immovable property specially reserved for the eldest son, it is not the practice for the children born of one mother to effect a formal and rigid division - as opposed to a temporary and ad hoc allocation, based on needs - of the immovable part of the estate<sup>1</sup>. The reason given for this state of affairs is that the co-operation and good will usually existing between such children make it undesirable for the inherited immovable property to be enjoyed by them otherwise than as family property<sup>1</sup>. One informant has, however, observed that this traditional method whereby full brothers and sisters enjoy their inherited immovable property in common is nowadays being threatened by two new developments, namely: the increased opportunities for travel open to people, which often find members of the family taking up residence in different parts of the country or in different countries; and the evergrowing tendency towards the individualization and capitalisation of land<sup>2</sup>.

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1 Chiefs Salubi and Akiri. Cf. Omoneukanrin, op.cit., p.73.

2 Mr S.O. Akarue.



(a) The eldest son

He takes his father's dwelling house<sup>1</sup>, but is obliged to permit his younger brothers to reside therein with him<sup>2</sup>. His unmarried sisters also have the right to live in it. Where the father left more than one house (say, two), he may take only the one in which the deceased lived and allow the immediate brother next to him in age to inherit the other<sup>3</sup>. It is, however, stated that since the sons are full brothers, inheritance rights determined with respect to age may bow before considerations based on the genuine needs of younger sons; and that an older son already owning a house of his own may waive his right of taking his father's house in favour of a less enterprising younger brother<sup>4</sup>.

As regards the father's lands and economic trees, such as plantations of rubber and palm, the eldest son is entitled to at least one plot and one plantation; and to the largest share of these items of the deceased's property<sup>5</sup>.

In respect of the movable property, certain specific

- 1 Thomas, (1910), pt.1, pp.85-6; Ward Price, Land tenure in the Yoruba Provinces (1933), para. 374; Omoneukanrin, loc.cit.; Rowling, Land tenure in Benin Province (1948), para. 23; Egharevba, op.cit., p.38.
- 2 Bradbury, op.cit., p.47; Rowling, ibid; Thomas, (1910), pt 1, p.66.
- 3 Cf: Egharevba, loc.cit.; Bradbury, loc.cit.
- 4 Ovie of Ughelli and Chief Akiri.
- 5 See, for instance; Thomas, (1910), pt.1, pp.66,84-8; Egharevba, loc.cit.; Bradbury, op.cit., pp.47,120 and 152;

items are reserved for him; and they include at least one of the following, for example: his father's guns and spears, coral beads and walking-stick.<sup>1</sup>

In addition to his rights indicated above, the eldest son receives the largest share in that part of the deceased father's movables which goes to his children<sup>2</sup>.

(b) The eldest daughter among the Isoko and Urhobo:

Ovworõn

Among the Isoko and Urhobo, an eldest daughter is entitled to one article of special value, usually coral beads, out of the movables before the division takes place<sup>3</sup>.

(c) The youngest child among the Isoko, Itsekiri and Urhobo

The position of the deceased's youngest child in respect of the division of his father's movable property is a privileged one among the Isoko, Itsekiri and Urhobo.

5 .....Omoneukanrin, loc.cit.; Lloyd, "The Itsekiri" in The Benin kingdom (1957), ed. Bradbury, p.184; Rowling, ibid.

1 Cf. Omoneukanrin, op.cit. p.74; Lloyd, op.cit., p.201.

2 Thomas, (1910), pt.1, pp.84-9; Omoneukanrin, op.cit., pp.73-4; Bradbury, op.cit., pp.120 and 152; Lloyd, op.cit., p.184; cf. Egharevba, loc.cit.

3 Ovie of Ughelli and Chief Akiri (Isoko).

He is accorded rights of inheritance in his father's movable property out of proportion to his age; which makes his place in the scheme governing the division of movable property second only to that of the eldest son<sup>1</sup>. It is not, however, true, as stated by Thomas, that the "last child" (ublevie)<sup>2</sup> gets a big share in the same way as the eldest<sup>3</sup>. What enhances his share in the movable property is the special article, such as goldware, or special amount of money, which he receives in addition to the normal share to which he is entitled when the movable property is finally distributed<sup>1</sup>.

(d) The eldest grandchild among the Isoko and Urhobo:  
Ovwromọ-okpako

Another child, who receives preferential treatment with regard to the division of the movable property inherited by a man's children, is his eldest grandchild; irrespective of the seniority or sex of the latter's parent; i.e. the position of the eldest grandchild's parent as the eldest son or youngest daughter of the deceased is immaterial, the eldest grandchild being the

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1 Mr S.O. Akarue (Urhobo) and Chief J.A. Akiri (Isoko).

2 The correct spelling of this word is "ubrevwie" (Urhobo) or "ubreye" (Isoko).

3 Thomas, (1910), pt.1, p.89.

one actually born first by any of the deceased's children. But his share does not come to anything near that of the youngest child. He does not share the estate with his uncles and aunts (the deceased's children); he is merely lifted from the second generation to which he belongs and given an article of sentimental value, such as a wrapper (cloth) or an odd piece of bead<sup>1</sup>.

(e) The position of the other children

(i) Sons

As already stated, they have a right to live with their eldest brother in their deceased father's house, which devolves upon him. If the deceased left two houses, only the one in which he lived goes to the eldest son, and the other is inherited by the second son.

After the disproportionately large share of the eldest son has been carved out of the deceased's immovable property, the rest is shared among the younger sons in diminishing portions according to their ages<sup>2</sup>; and, as has been observed, sometimes on considerations of the actual needs of individual sons. It must not

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1 Ovie of Ughelli (Urhobo), Chief J.A. Akiri (Isoko) and Mr S.O. Akarue (Urhobo).

2 Thomas, (1910), pt.1, pp.66, 84-9; Omoneukanrin, op.cit., p.73; Egharevba, loc.cit; Bradbury, op.cit. p.120.

be assumed that it is a rule of the customary law that daughters are precluded from inheriting their father's immovable property. On the contrary, and as will appear later, their inheritance rights in such immovable property, especially where there are no surviving sons, are very much recognised. But, owing to the usually co-operative spirit existing among full brothers and sisters already pointed out, and other considerations which will be referred to subsequently, daughters do not normally take a keen interest in the division of any lands and economic trees left by their father.

In regard to the division of that part of their father's movable property, which falls to be divided among the children, the same considerations affect and influence the sharing as those already discussed in relation to the immovable property; except that both sons and daughters take alike<sup>1</sup>.

(ii) Daughters - where there are surviving sons

A daughter is not permitted by law to inherit her deceased father's house, since she is sooner than later obliged to leave the family on her marriage; when she

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1 Thomas (1910), pt.1, pp.84 ff; Omoneukanrin, op.cit. p.74; Egharevba, loc.cit.; Bradbury, op.cit., pp.120 and 152.

will be unable to take an active part in the corporate activities of her family. But, she has a right to live in her father's house, which she may take up as her permanent residence on the dissolution of her marriage; or she may use it as a temporary shelter on any of her usual occasional visits to her own family<sup>1</sup>.

In respect of her father's lands and plantations, however, a daughter has clearly established rights of inheritance, though, in practice, these are not generally pressed on considerations of her marriage - when she must go to her husband who will provide her with the land she requires<sup>2</sup> - and those relating to the solidarity of the kin group constituted by brothers and sisters of the whole blood. Where, however, a daughter remains unmarried (a rare spectacle<sup>3</sup>), she is entitled to take her share in her father's lands and economic trees along with her brothers<sup>4</sup>.

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1 Thomas, (1910), pt.1, p.88; Thomas, "The Edo-speaking peoples" (1910), 10 J.A.S. 1 at p.5.

2 Bradbury, op.cit., p.28.

3 Cf. Hubbard, J.W., The Sobo of the Niger Delta (1948) pp.122 and 152: "These women are all without exception married ...." and "... every Sobo [i.e. Urhobo and Isoko] woman is married".

4 Ovie of Ughelli and Chief Akiri.

The inheritance rights of the deceased's daughters in respect of his movable property have been briefly touched upon in the section dealing with the rights of sons; where it has been stated that daughters share with their brothers the portion of the movable estate reserved for the children. We may add that daughters usually take a share of the cash, crops and articles, such as coral beads, which have feminine use and attraction; leaving things used by men for their brothers to take.

Where there are no surviving sons

In default of sons, a full brother takes the deceased's house<sup>1</sup>. Failing a full brother, it is inherited by a half-brother, uncle or nephew on the paternal side; and failing these, the oldest paternal relative - in that order<sup>2</sup>. The general rule as regards the age of such a paternal male relative is that he must not be older than the deceased<sup>3</sup>. It has, however, been stated by informants that this general rule is nowadays not always observed among the Urhobo and Isoko; and that

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1 Cf. Thomas, (1910), pt.1, pp.87-8. Thomas's statement at pp. 86 and 89, ibid, to the effect that the Urhobo (Ughelli) and Isoko (Iyede) customary law rules permit a daughter to take her deceased father's house is not supported by the Ovie of Ughelli nor by Chief Akiri, who (the latter) also belongs to Iyede clan.

2 Oba of Benin, Chiefs Salubi and Akiri.

3 Bradbury, op.cit., pp.44 and 50; cf. Omoneukanrin, op.cit., p.74; where, however, the Itsekiri rule is stated as being applicable only in respect of the taking over of the deceased's widows.

an elder brother of the deceased may still be allowed to enjoy inheritance rights where he has not got much property of his own.<sup>1</sup>

Daughters are here (i.e. where there are no sons) more insistent on the exercise of their inheritance rights with respect to their deceased father's lands and economic trees. And it matters not whether they are married and, so, at their husband's homes or not: they take the economic trees<sup>2</sup>; and cultivate the lands from their place of marriage<sup>3</sup>. Sometimes, they may allow a trustworthy male member of their family, their father's brother or nephew, to take charge of the property as a caretaker accountable, of course, to them. As already noted, these forms of inherited property are not normally rigidly divided among children of the same mother. Should the need arise, however, for formal division of such property, the usual mode of distribution is followed, that is, the shares are fixed in relation to the ages of the daughters along the lines discussed above.

The division of the movable property is carried out in more or less the same manner as it is effected where

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1 Chiefs Salubi and Akiri.

2 Thomas, (1910), pt.1, pp.85 and 88.

3 Thomas, op.cit., p.87.



there are sons and daughters; with the qualification that among the Urhobo and Isoko, the absence of sons may entitle the remoter relatives to a larger share of this part of the estate<sup>1</sup>. The information, however, is that the consent of the daughters is essential in this case; and that they may decide to share all their portion of the movable property, including articles used exclusively by men, in the hope that their own sons will find use for some of the items of property comprised therein<sup>1</sup>.

#### The posthumous child

A posthumous child is entitled to inherit from the deceased father's estate along with the other children; for, as an author has stated the rules of the Isoko and Urhobo law on the point: "Posthumous children are usually treated like other children"<sup>2</sup>.

The author does not, however, make it clear what the inheritance rights of such a child will be, if he is still unborn at the time of the distribution. In other words, are his rights absolute, or do they depend on his being born and born alive before the distribution occurs? As may be recalled, this question has already

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1 Chiefs Salubi and Akiri.

2 Thomas, Anthropological report on the Edo-speaking peoples (1910), pt.1, p.88; also at pp.68 and 85, ibid; Bradbury, The Benin kingdom (1957), p.121.

been considered in connection with the Benin rules; which accord rights to such a child, if, and only if, he is born alive before the time of distribution<sup>1</sup>.

The general position with respect to the inheritance rights of the posthumous child is covered by the rules of the Benin customary law on the point<sup>2</sup>. It may, however, be added that where such a child is also, as may often be the case, the deceased's youngest child, he may be entitled to a larger share than is justified by his age; in accordance with the rules of distribution followed by the Isoko, Itsekiri and Urhobo, which have been discussed above.

(f) Other relatives

It has already been briefly stated that, barring the position among the Bini where the deceased's other relatives do not benefit if there are surviving children, some share of the movable property of the deceased is given to his relatives, such as brothers and sisters, nephews and nieces. The share which these relatives take, however, does not bear any fixed proportion to that divided among the children; and its size is deter-

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1 Oba of Benin.

2 See the authorities cited in footnote 2 on page 348. Confirmed by informants: Ovie of Ughelli and Chief Akiri.

mined largely by the family as a whole, and the generosity or otherwise of the deceased's children, especially the sons.

A learned author has summarised the position among the Akoko-Edo as follows:

"... they [i.e. the deceased's sons] may agree to give something to their father's brothers". (1)

Among the Itsekiri, part of the movable property of the deceased is shared among a wider compass of his kinsmen, referred to by one author as "close relations"<sup>2</sup>. Lloyd, however, holds a contrary view and states that a brother takes a share only in the absence of children<sup>3</sup>. In view of the similarities between the inheritance rules of the Itsekiri and those observed among the Isoko and Urhobo<sup>4</sup>, however, Omoneukanrin's statement of the Itsekiri rules is to be preferred to that of Lloyd. The term "close relations" is not defined by the author in

1 Bradbury, op.cit., p.120.

2 Omoneukanrin, op.cit., p.74.

3 Lloyd, "The Itsekiri" in the Benin kingdom (1957), ed. Bradbury, p.184.

4 See: Glanville and Roth, "Notes on the Jekris, Sobos and Ijos of the Warri District", (1898-9) 28 J.R.A. I. 104 at p.118; It is not, however, correct as these writers have stated, that the Ijaw also "inherit like the Jekris". The Ijaw rules are dealt with in the next pattern of inheritance rules. See also: Thomas, (1910), pt.1, p.89 - the Etsako having rules similar to those found among the Ijaw.

the section, but it may be inferred from his earlier description of the Itsekiri kinship system that it extends to uncles, aunts, grandchildren and first cousins<sup>1</sup>.

The range of relatives admitted to participation with respect to the deceased's movable property is sometimes expanded among the Isoko and Urhobo, depending on the cohesion and co-operation existing between the members of the extended family. But closer relations - i.e. brothers, sisters, nephews, nieces and grandchildren - are singled out for individual shares; while other relatives are given a joint share for division among themselves; the sizes of the individual shares depending on the ages of these relatives on the lines indicated in connection with the division among the deceased's children<sup>2</sup>.

It will have been observed that unless the movable property comprised in the estate is substantial and the deceased's children are generous, the share which a remoter relative receives on distribution may be precious little, especially where the family is large. Indeed, one informant on the Urhobo custom has stated that there have been instances where remote relatives have got nothing more than a few pennies or a ragged piece of the deceased's

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1 Omoneukanrin, op.cit., chap.8, pp.52-8.

2 Ovie of Ughelli and Chiefs Akiri, and Salubi.

cloth from the distribution<sup>1</sup>. He, however, adds that the idea behind such dispersal of the inheritance is to foster the solidarity of the family<sup>1</sup>.

By the same token, the fostering of the solidarity of the kinship group, it is the usual custom among the Isoko and Urhobo to assign some articles of nominal value to the maternal relatives of the deceased as a group; leaving it to them to effect division among themselves<sup>2</sup>. This appears to be an instance of double descent recently noted by a writer on a group of Ibo in the Afikpo Division of the Eastern Region<sup>3</sup>. There is nothing, however, in this custom as practised by these two ethnic groups in our area of special reference

1 Chief Salubi.

2 Ovie of Ughelli and Chief Salubi. Cf. Thomas, (1910), pt. 1, p.87, where he accurately observes that a member of the deceased's maternal family may be permitted to take over a widow at Evleni (Evvreni), [the present writer's home town] in Urhobo Division.

3 Ottenberg, S., "Double descent in an Ibo village group", Selected papers of the Fifth International Congress of Anthropological and Ethnological Sciences, September 1956 (Philadelphia) 473-80.

approaching the matrilineal principle in the double-descent system of the Afikpo Ibo, where, as this writer has pointed out, "the head of the dead man's matrilineage is in charge of the distribution of his goods"<sup>1</sup>; and where the deceased's movable property goes to "the matrilineage to be divided equally among its male members, except for a few shillings given to the sons to help to perform the burial"<sup>1</sup>.

#### The deceased's widow

As in the societies whose rules have been discussed, the widow enjoys no rights of inheritance in respect of her deceased husband's estate. But as regards the right of one of the kinsmen of the deceased to take over such a widow (i.e. the one having surviving children for her late husband), however, the rules of the customary law observed by the Akoko-Edo (some of) and Bini differ from those followed by the Isoko, Itsekiri and Urhobo.

For, whereas, among the Akoko-Edo (some of) and Bini, she is free to return to her family<sup>2</sup>; among the

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- 1 Ottenberg, op.cit.; p.478. For a description of this system among the Yakò, see Forde, D., Yako studies (1964), chap. 4.
  - 2 Roth, Great Benin (1903), pp.37 and 97; Dennett, At the back of the black man's mind (1906), p.199; Thomas, (1910), pt.1, pp.50 and 68; Talbot, The peoples of southern Nigeria (1926), vol.III, p.685; Egharevba, op.cit., pp.38 and 76; Bradbury, op.cit., pp.47 and 120-1.

Isoko, Itsekiri and Urhobo, she is obliged to marry one of her deceased husband's kinsmen or, failing that, to refund part of the bride price paid by the deceased in respect of the marriage<sup>1</sup>. Sometimes, however, she may be allowed to leave the family and marry somewhere else, if she has lost two (successive) husbands, who are both members of the family - that is to say, if the deceased himself took her as wife on the death of some other member of his family<sup>2</sup>. But such special dispensation granted to this kind of widow must, despite an assertion to the contrary<sup>3</sup>, be distinguished from the fairly strict law on the point; which is, that she is under a perpetual obligation to remain married within the family, notwithstanding the number of husbands she has lost therein, as long as there is a pool of eligible members. However, as an informant has stated, a widow who has lost two husbands within the family - especially where they died at close intervals - is popularly regarded as a witch and danger; and as such must be rid of the family<sup>4</sup>.

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1 Thomas, (1910), 10 J.A.S.1 at p.6; Welch, "The Isoko tribe" (1934) 7 Afr. 160 at p.172; Omoneukanrin, op.cit., p.74; Loremeke v. Nekegho and anor. (1957) 3 W.A.L.R. 306 at p.308 esp.; In the Estate of Agboruja (1949) 19 N.L.R. 38, esp. at p.39; Bradbury, op.cit., p.152.

2 Omoneukanrin, loc.cit.

3 Thomas, (1910), pt. 1, p.85.

4 S.O. Akarue.

Since the deceased's widow is the mother of the sons, the relative to take her as wife is her late husband's full brother<sup>1</sup>. Failing such a brother, a half-brother may do so<sup>2</sup>. In default of such brothers, any other paternal relative, such as a nephew or cousin, may marry the woman. Any relative taking her over may not, however, be older than the deceased husband<sup>3</sup>; though as has been pointed out in connection with the position among the Isoko and Urhobo, this rule is not strictly observed today.

#### Ceremony marking the taking over of the widow

The type of ceremony to be performed by the new husband of the woman is similar to that described in connection with the relevant procedure followed by the Ishan and the nobility of Benin; except that the animal provided for the rite among the Isoko and Urhobo may be a goat (as among the Ishan and Bini) or a sheep.<sup>4</sup>

#### (2) The estate of a married man survived by children born of different mothers

Where a married man is survived by children born to

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- 1 Thomas, (1910), 10 J.A.S.1 at p.6; Welch, "The Isoko tribe" (1934) 7 Afr. 160 at p.172; Omoneukanrin, op.cit., p.74; Loremeke v. Nekegho and anor. (1957) 3 W.A.L.R. 306 at p.308 esp.; In the estate of Agboruja (1949) 19 N.L.R. 38, esp. at p.39; Bradbury, op.cit., p.152.
  - 2 In the estate of Agboruja (1949) 19 N.L.R.38; cf. Omoneukanrin, loc.cit.
  - 3 Omoneukanrin, loc.cit.
  - 4 Bradbury, op.cit., pp.152 and 158.



him by more than one woman, the basic mode of distribution is that the children of each mother, irrespective of sex, take as a unit<sup>1</sup>; and effect the internal division of the property among themselves, if need be, in accordance with the rules already considered.

Such mode of distribution takes place after the special shares of certain of the children have been carved out of that part of the estate to be distributed among the children. It will be recalled that these shares include those relating to the privileged rights specially reserved for the eldest son; the distinct shares of the movables which the eldest daughter and the eldest grandchild receive among the Isoko and Urhobo; and the enhanced one of the youngest child among the Isoko, Itsekiri and Urhobo.

In practice, except where she has no full brother, a daughter does not figure prominently at the family gathering, whereat the estate is distributed; and is content to allow her eldest full brother (who may be younger than herself) to receive the share falling to all her mother's children<sup>2</sup>. This practice has the effect of misleading the foreign observer into believing that

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1 Bradbury, op.cit., p.31.

2 Oba of Benin, Ovie of Ughelli and Chief Akiri.

the estate of a man leaving children born by different mothers is shared among the eldest sons of each woman<sup>1</sup>; while the true position is that both sons and daughters are entitled to inherit as has been pointed out.

### The deceased's widows

It has already been observed that the Akoko-Edo (some of) and Bini rules do not require a widow to marry within the family of her husband, if she has a surviving child for him. Among these peoples, therefore, widows fortunate enough to be blessed with children (surviving ones) may return to their own families.

As already noted, under the relevant rules followed by the Isoko, Itsekiri and Urhobo, all widows are obliged to marry within their deceased husband's family; or refund part of the bride price. In theory, the deceased's sons have the strongest claim to take over their father's widows<sup>2</sup>, except, of course, that no son marries his own mother. In practice, however, most of the widows are generally too old for the deceased's own children; which

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1 See for instance, Thomas, (1910), pt.1, pp.66 and 85 ff; Bradbury, op.cit., p.46.

2 See: Thomas, (1910), pt.1, pp.50 and 85-7; Bradbury, op.cit., p.47; Roth, Great Benin, pp.37 and 97; Talbot, (1926), vol.III, p.685; Dennett, loc.cit.; Egharevba, op.cit., pp.38 and 76; Omoneukanrin, loc.cit.; Glanville and Roth, (1898-9) 28 J.R.A.I. 104 at p.118.

accounts for the custom among the Isoko and Urhobo, whereby the eldest son is accorded a special right of ceremonially assuming his father's position with the latter's youngest wife at his side - as his (the eldest son's) wife.<sup>1</sup>

Where, as is to be expected, the widows are much older than their late husband's sons, his brothers and other paternal relatives take them over. Sometimes, as among the Isoko and Urhobo, a member of the maternal family of the deceased may be given the right to marry one of the widows<sup>2</sup>.

#### Principle of representation

There is no principle of representation; and the issue of a child predeceasing the person he would have succeeded does not inherit in the former's stead<sup>3</sup>. But, as has been seen, such an issue is not entirely without some rights in the scheme of inheritance found among the Isoko, Itsekiri and Urhobo. If he is a grandchild of the deceased, he is entitled to some of his movable property along with that class of kinsmen referred to as "close relations". If he is also the first child of

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1 Ovie of Ughelli, Chiefs Salubi and Akiri.

2 Thomas, (1910), pt.1, p.87; confirmed by informants named in footnote 1 above.

3 Chiefs Salubi and Akiri; Oba of Benin.

the deceased's eldest son, he will receive a share larger than that given to any of the other grandchildren of his age-group in accordance with the practice observed by the Isoko and Urhobo<sup>1</sup>.

Who are a man's children?

The rules governing legal paternity in the case of holders of hereditary titles among the Bini have been examined. It need only be added that the same rules apply to all the people of Benin. In regard to the position among some of the Akoko-Edo, it may be stated that the rules observed are not dissimilar from the Benin ones, since, as we have seen, there is complete identity between the rules followed by these peoples in respect of the rights of the deceased over his widows. We may briefly recall the statement of the rules relating to legal paternity among these groups by saying that the affiliation of children ( who may inherit from their father) is geared to the settlement of the bride price or some other payment in respect of the marriage or betrothal of the children's mother; or, failing which, the payment of the necessary compensation to her family.

On the other hand, the relevant rules of the

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1 Ovie of Ughelli, Chiefs Salubi and Akiri.

customary law of the Isoko, Itsekiri and Urhobo are based on what may be termed the dictates of compassionate nature, by virtue of which biological paternity alone sanctifies the child and ascribes to him the status of legitimacy; providing that the paternity is not in doubt<sup>1</sup>. Thus, Omoneukanrin states the Itsekiri law (and the position among the Isoko and Urhobo is the same) as follows:

"Any child born in concubinage was not looked on as 'illegitimate' in the strict English sense of the word, but, on the contrary, it was tenderly treated by the father.... Illegitimacy was recognised only when a woman was unable to say who the father of her child was, but this was a very rare occurrence". (2)

A more recent writer on the Itsekiri has expressed this point more vividly when he says:

"A man has rights over any child of which he can claim biological paternity ..... A child is rarely considered a bastard and given in custody to its mother and her parents: such only happens when paternity is genuinely in doubt as with children of prostitutes". (3)

But, although the status of legitimacy is determined, as stated, quite independently of the legal status of the child's mother as a married woman, it is said that, as regards rights of inheritance among the Itsekiri, however, children born to the deceased by his wives tend

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1 Omoneukanrin, Itsekiri law and custom (1942), pp.45-6; Lloyd, "The Itsekiri" in the Benin kingdom (1957) ed. Bradbury, p.191.

2 Omoneukanrin, loc.cit.

3 Lloyd, loc.cit.

to claim better rights to his estate than those born to him by his lovers.<sup>1</sup>

Among the Isoko and Urhobo, the information is that children born to a man by his lover are placed on an equal footing with those born to him by his wives with respect to inheritance matters, and, indeed, for all purposes<sup>2</sup>. In point of fact, a child born to a man by his lover confers some amount of social prestige on him (the father); and entitles him to be outside the ambit of the operation of a rather annoying social convention. This convention forbids anyone, not being a person who has performed some feat of bravery<sup>3</sup>, to drink at any gathering, from a glass or other container while it is held with the consumer's left hand. The origin of this convention goes back to the troubled days of old when duels and unprovoked assaults were the order of things; and when a man's lover, considering that he had no exclusive rights over her, could be forcibly taken away unless he could protect his legally unenforceable rights by the strength of his good right arm<sup>2</sup>.

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1 Omoneukanrin, op.cit., pp.45 and 73; Lloyd, loc.cit.

2 Chiefs Salubi and Akiri.

3 Similarly, a man who has slain a leopard is immune from the observance of this social convention. In the olden days, the most obvious heroic act was the successful hunting of the head of a human being during warfare - a state which then perpetually existed.

As will have been noted from the discussion of the rules governing the affiliation of children among the Isoko, Itsekiri and Urhobo, an adulterer has the legal right over the child resulting from his association with the wife of another man. In other words, the rules now under consideration have no place for the legal maxim - "bride price is child price" - which is found in the relevant rules observed by the Akoko-Edo, Ibo, Bini, Ivbiosakon and Ishan; and which emphasise the importance of the contract of marriage in the matter of the affiliation of children.

The adulterer is, of course, liable to pay compensation to the woman's husband<sup>1</sup>. The question which then arises is whether such compensation is payable by the adulterer in respect of the legal paternity of the adulterine child; or it represents damages arising out of the civil wrong of adultery committed against the woman's husband. A very learned author's view is that such payment secures the adulterer's right to the child's legal paternity, for he says:

"If a betrothed girl bears a daughter to a man other than her future husband, the genitor, provided he has paid compensation to the husband, may claim the marriage payment when the daughter is herself married".(2)

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1 Omoneukanrin, op.cit., pp.45, 49-50.

2 Bradbury, The Benin kingdom (1957), p.137.

With the greatest respect, this view is not supported by either the present writer's observation as a member of the two groups the author has in mind (Isoko and Urhobo); or, what is more, the account of informants versed in the relevant rules found among these peoples<sup>1</sup>. The correct view is that the liability of the adulterer to pay damages in respect of his adultery has nothing whatsoever to do with his right over the child resulting from his tortious act: it belongs to him whether or not he, in fact, pays such damages.

For still greater reasons, one may take leave to disagree with another view of the very learned author expressed, this time, with respect to the status of the child born of an unmarried mother. He seems to suggest that such a child is illegitimate unless the father has paid compensation to the woman's father.<sup>2</sup>

(3) The estate of a married man leaving no children

When a married man dies leaving no children, the whole of his estate, in the case of the Bini, is inherited exclusively by his full brothers<sup>3</sup>, excluding,

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1 Ovie of Ughelli, Chiefs Salubi and Akiri, and S.O. Akarue, Esq.

2 Bradbury, The Benin kingdom (1957), p.137.

3 Thomas, (1910), pt.1, p.66; Egharevba, op.cit., pp.38 and 77; Bradbury, op.cit., p.47.



however, any of them who are older than himself<sup>2</sup>.

Among the other peoples included in this pattern of succession, the rules spreading the benefits of inheritance to other relatives, already noted, are observed; and full brothers take the substantial part of the estate<sup>3</sup>, while some part of the movable estate is divided among other relatives, such as half-brothers and others. Full sisters, however, enjoy rights more or less similar to those of married daughters who, as has been seen, are content with receiving some articles of feminine use out of the movable property; while they leave the rest of the property to their full brothers.<sup>4</sup>

The division of the whole, or substantial part, of the estate among these relatives is carried out in accordance with rules similar to those observed in the case of a man survived with children; with the eldest brother of the deceased taking the place of the eldest son.

In default of full brothers, half brothers rank next<sup>5</sup>; but the information, even among the Bini where the nearest class of relatives excludes the others, is

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2 See Bradbury, op.cit., pp.44 and 50.

3 Thomas, (1910), pt.1, pp.84 and 87; Bradbury, op.cit. p.120.

4 Ovie of Ughelli, Chiefs Salubi and Akiri.

5 Thomas, (1910), pt.1, p.66; cf. Egharevba, op.cit., p.38.

that the deceased's full sisters are then entitled to a substantial share in the division of the movable property, such as money<sup>1</sup>. Half sisters have little rights in the scheme of distribution, except for articles of nominal value which they take.<sup>1</sup>

Failing brothers (of the whole or half-blood), the order of priority with regard to those who inherit the whole or bulk of the property is uncles (who generally speaking, may not be older than the deceased), nephews and cousins<sup>2</sup>; failing whom, the head of the family takes, it is said, reluctantly<sup>3</sup>. Parents are excluded on the ground that the death of a child in the lifetime of a parent is looked upon as a calamity, terrible enough to erase any idea of inheritance from the latter's memory<sup>1</sup>.

It should be observed that where the deceased's remoter relatives are of the half-blood, the mode of distribution is the same as that described in connection with the division of the estate of a man survived by children born of different mothers. This means that

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1 Oba of Benin, Ovie of Ughelli, Chiefs Salubi and Akiri.

2 See Egharevba, op.cit., pp.38 and 77, who, however, includes nieces; a point on which he has not been supported by the Oba of Benin.

3 Ovie of Ughelli, Chiefs Salubi and Akiri.

the distribution is according to "houses" or "doors", with the children of each mother taking as a unit of inheritance.

Where there are no surviving relatives: rights of the ruler

The property of a man leaving no real relatives - a very rare occurrence - goes to the head of the community, such as the Oba, Olu, Ovie, Odion, Olokpe, etc., who must, however, arrange the performance of the deceased's burial and funeral.<sup>1</sup>

It is the practice among the Bini for the ruler to waive his rights in favour of any illegitimate children that the deceased may have left surviving him<sup>2</sup>.

(4) The estate of a married woman

The property of a married woman, survived by children, is inherited jointly by the latter in the same way as that of a married man leaving children born to him by one woman<sup>3</sup>; except that her daughters, for obvious reasons, succeed to more of her personal chattels and

1 Thomas, (1910), pt.1, p.67; Egharevba, op.cit., pp.38 and 78.

2 Thomas, (1910), pt.1, p.67; Thomas, (1910), 10 J.A. S.1 at p.6. This is confirmed by the Oba of Benin.

3 Thomas, Anthropological report on the Edo-speaking peoples, pp.66, 85 and 88; Egharevba, Benin law and custom, p.39; Bradbury, The Benin kingdom, p.47.

household utensils than in the case of their deceased father's estate.

Where there are no surviving children

Barring the position among the Bini, where a husband inherits the post-nuptial acquisitions of a wife leaving no surviving children<sup>1</sup>, the general rule is that all the property of a deceased childless wife is returned to the members of her own family for distribution among themselves<sup>2</sup>.

The rules governing the distribution of the property of such a woman among the members of her own family are similar to those applicable in respect of the estate of a married man leaving no children. The only qualifications that may be made here are that sisters, for obvious reasons, take more of the deceased woman's personal effects, such as articles of clothing and adornment, household and kitchen utensils; and that there would, of course, be no widows for anyone to marry.

(5) The estate of an unmarried person

(i) Unmarried man

If the unmarried deceased male left any legitimated

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1 See chapter eight, pp.305 and 306.

2 Thomas, (1910), pt.1, p.88.

children, as among the Akoko-Edo and Bini; or any children in the case of the Isoko, Itsekiri and Urhobo, these, as has already been pointed out, stand to inherit his estate. Such children inherit as outlined above.

If he left no surviving children, then the scheme of inheritance is, again, as has been shown; except that no widows will be available to his heirs.

(ii) Unmarried woman

Any children born of an unmarried woman share her property as joint heirs and in accordance with the rules discussed in relation to the estate of a married woman survived by children.

If there are no children, the whole of her property falls to be inherited by the members of her family in the same way as the estate of a married deceased woman (or part thereof, as among the Bini) is distributed.

CHAPTER ELEVENRULES OF DISTRIBUTION IN TYPE "D" SOCIETIES -ETSAKO AND IJAWScope

In this chapter, we shall be concerned mainly with the rather interesting topic of the inheritance rights of children with respect to their father's property which, as will appear fully, depend largely on whether they (children) are the issue of a marriage in which a substantial sum has been paid as bride price; or whether they are the offspring of a union in which the amount of bride price paid has been negligible. This restriction in respect of the rules of distribution has been imposed on the ground that the rules governing the rights of other relatives in the societies already treated cover broadly the position among the Etsako and Ijaw<sup>1</sup>.

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1 On this, see: Thomas, Anthropological report on the Edo-speaking peoples (1910), pt.1, pp.71-6 and 80-3; Thomas, (1910), 11 J. Comp. Leg. (N.S.) 94 at p.99-100; Rowling, Land tenure in Benin Province (1948), paras. 49-50; Bradbury, op.cit., pp.106-7. Cf. Talbot, Tribes of the Niger Delta (1930) pp.289-90. Confirmed by two informants on the customary law of the Ijaw of the Mid-Western Region: Chiefs B.S. Ekpekepe and L.A. Aborosan.

Since marriage, then, is an important element in determining the right of children to inherit from their father, this institution will be briefly examined; and the types of it practised by the two groups outlined. In our examination of this institution, the popular, if somewhat inaccurate, terms - "big dowry" and "small dowry" systems - will be adopted in designating the types. The vernacular terms will also appear (in brackets), the Etsako terms appearing before the equivalent or similar ones employed by the Ijaw east and west of the Niger.

(A) RIGHTS OF CHILDREN IN RESPECT OF THEIR DECEASED FATHER'S ESTATE

- (1) Where he married under the "big dowry" system  
(amoya<sup>1</sup>, braere<sup>2</sup> or ya<sup>3</sup>)

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- 1 This Etsako term is also spelt amoiya or amoiia. See: Thomas, (1910), pt.1, sections III and IV, esp. pp.47, 54 ff and 80 ff; Thomas, (1910), 11 J. Comp.Leg. (N.S.) 94 at pp. 96 and 99; Thomas, (1910), 10 J.A.S.1 at pp. 5 and 7.
- 2 Mid-Western Ijaw term: Chiefs B.S. Ekpekpei and L. A. Aborosan.
- 3 This Eastern Ijaw term is sometimes also spelt iya. See: Talbot, The peoples of southern Nigeria (1926) vol.III, p.438; Talbot, Tribes of the Niger Delta (1930) pp.189 ff; The Eastern Nigeria Government Printer, Report of the Committee on bride price (1955), paras. 205-6, 212, 215-6 and 223; Williamson, K., "Changes in the marriage system of the Okrika Ijo" (1926) 32 Afr. 53 at pp.55-6; Jones, G.I., The trading states of the Oil Rivers (1963)pp.51 ff.

(a) The marriage

As the popular name implies, a "big dowry" marriage involves the payment of a considerable sum of money as bride price by the husband to the woman's parents.<sup>1</sup> In 1948, one author estimated the amount of bride price payable in respect of the Braere marriage, practised by the Mid-Western Ijaw, at around £60.<sup>2</sup> Informants, however, say that it now stands at between £100 and £150<sup>3</sup>. Some forty years ago, a man had to find about £45 in order to marry under the ya system of the Eastern Ijaw<sup>4</sup>. It should be observed, however, that, in view of the Limitation of Dowry Law of the Eastern Region, the amount of bride price payable shall not exceed £30<sup>5</sup>.

(b) Affiliation of children of the marriage

The children of the marriage are affiliated to

1 "The amount of the big dowry has always been high...." Report of the Committee on bride price, op.cit., para. 41. See generally the authorities referred to in footnote 3 on p.370, and the following: Rowling, op.cit., para. 49; Hubbard, J.W., The Sobo of the Niger Delta (1948) pp. 191-2; Bradbury, op.cit., p.108.

2 Hubbard, loc.cit.

3 Chiefs B.S. Ekpekpei and L.A. Aborosan.

4 Talbot, (1926), vol.III, p.438; Talbot, (1930), p.190.

5 The Limitation of Dowry Law, No.23 of 1956, s.3; for comments on the Law, see: Williamson, (1962) 32 Afr. 53 at p.59.



the woman's husband<sup>1</sup>; and this is so notwithstanding that any of them may have resulted from their mother's adulterous union<sup>2</sup>. It will, however, be recalled that there is judicial authority to the effect that the claim of the legal husband to the paternity of a child born in such circumstances will be rejected by the court, on the ground that it offends the repugnancy doctrine<sup>3</sup>.

There is a local custom among the Okrika Ijaw of the Eastern Region, under which every third child of the marriage is affiliated to its mother's family<sup>4</sup>. It is also stated that the family of the wife prefer a girl to a boy, as the third child that is to be affiliated to them; and that, if such a child turns out to be a boy, "they will try to 'do a deal' by persuading the other family [i.e. that of the husband] to give them instead a girl in marriage under this system".(5)

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- 1 Thomas, (1910), pt.1, section III, esp. pp.47, 54 and 56; Thomas, (1910), 11 J. Comp.Leg (N.S.) 94 at pp.95-7; Talbot, (1926), vol.III, p.437; Talbot, (1930), pp.189-90; Rowling, op.cit., para. 49; Hubbard, op.cit., p.191; Report of the Committee on bride price, op.cit., paras. 41-206, 216 and 234; Williamson, op.cit., p.55; Jones, loc.cit.; Bradbury, op.cit., p.108.
  - 2 Talbot, (1930), pp.189-90; Report of the Committee on bride price, op.cit., paras 206 and 216; Williamson, (1962) 32 Afr. 53 at p.55.
  - 3 See Edet v. Essien (1932) 11 N.L.R.47, discussed in chapter eight at p.304.
  - 4 Report of the Committee on bride price, op.cit., para. 216; Williamson, op.cit., at p.55.
  - 5 Report of the Committee on bride price, op.cit. para.216.

(c) Succession to the deceased's estate

Except in the case of those of the children affiliated to their mother's family, as indicated above, the children of the marriage succeed to their deceased father's estate as joint heirs<sup>1</sup>. The ultimate division of the inherited property among themselves is carried out in accordance with rules similar to those already described in connection with such distribution among the Isoko, Itsekiri and Urhobo<sup>2</sup>.

Similarly, the rules governing the taking over of the widows of the deceased do not differ from those found among the Isoko, Itsekiri and Urhobo<sup>3</sup>.

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1 See: Thomas, (1910), pt.1, pp.75 ff; Thomas, (1910) 11 J. Comp.Leg.(N.S.) 94 at pp. 96 and 99; Rowling op.cit., para. 49; Bradbury, op.cit., pp.106-7. Confirmed by Mid-Western Ijaw informants, Chiefs Ekpekpei and Aborosan.

2 See generally the authorities referred to in the preceding footnote; also Glanville and Roth, "Notes on the Jekris, Sobos and Ijos of the Warri District", (1898-9) 28 J.R.A.I 104 at p.118. Note, however, that the statement by the writers (Glanville and Roth) to the effect that the Ijaw customary rules of succession are similar to those of the Itsekiri and Urhobo is accurate only in respect of the rights of the children of a "big dowry" (braere) marriage; and not, as will be seen, in respect of the children of a "small dowry" (ekiere) marriage.

3 For the relevant Etsako rules, see: Thomas, (1910), pt.1, pp.71-3; Thomas, (1910) 11 J. Comp.Leg. (N.S.) 94 at pp.96-7; Thomas, (1910), 10 J.A.S.1 at p.6; Rowling op.cit., para. 49; Bradbury, op.cit., p.108. The relevant rules of the Mid-Western Ijaw are to the same effect: Chiefs Ekpekpei and Aborosan.

- (2) Where he married under the "small dowry" system  
(isomi<sup>1</sup>, ekiere<sup>2</sup> or egwa<sup>3</sup>)

(a) The marriage

Under the "small dowry" type of marriage, the husband pays a relatively small sum of money as bride price to his wife's parents<sup>4</sup>. Some twenty years ago, the amount of bride price in respect of this type of marriage among the Ijaw of the Mid-Western Region was stated by an author in this way:

"... this is much cheaper, the payment being only £8 or £10...." (5)

Informants, however, say that the current price is between £20 and £40<sup>6</sup>.

(b) Affiliation of children of the marriage

The children of a "small dowry" marriage are

- 1 This Etsako term is also spelt isumi - Rowling, loc. cit.
- 2 Term employed by the Ijaw of the Mid-Western Region - Chiefs Ekpekpei and Aborosan.
- 3 This Eastern Ijaw term is also spelt igwa or igwa-sime: Talbot, (1926), vol. III, p.438; Talbot, (1930) pp.189 ff; Report of the Committee on bride price op.cit., paras. 205 and 212. Among the Okrika Ijaw (Eastern Region), the term used is yekuma - Williamson, op.cit., p.55.
- 4 See footnote 1 on p.372.
- 5 Hubbard, op.cit., p.191.
- 6 Chiefs Ekpekpei and Aborosan.

affiliated to their mother's family<sup>1</sup> or, more precisely, to her father<sup>2</sup>; and they answer to the name of the maternal family<sup>3</sup>.

Rights of the father over the children of the marriage

The fact that the children of the marriage belong to their mother's family has led some writers into believing that all that the husband acquires under this system is conjugal rights over the woman. Thus, Hubbard, writing on the Mid-Western Ijaw "small dowry" or ekiere marriage, says:

"... the husband has the use of his wife's labour in farm and market, and her body for sexual gratification; that is all" (4)

The truth, however, is that he has limited rights over his children: he is entitled to their personal services, especially where they choose to live with him and he maintains them<sup>5</sup>; he has a right to part, albeit a small part, of the bride price receivable in respect of the

1 See footnote 1 on p.372.

2 Thomas, (1910), pt.1, p.54; Thomas, (1910), 11 J. Comp. Leg. (N.S.) 94 at p.97; Bradbury, op.cit., p.108. The husband's rights over the children appear to be supplanting those of the mother's family. On this, see: Thomas, (1910), pt.1, p.55; Thomas, (1910), 11 J.Comp. Leg. (N.S.) 94 at p.96; Williamson, (1962), 32 Afr. 53 at pp.58-9.

3 Report of the Committee on bride price, op.cit., para.223.

4 Hubbard, loc.cit.; cf. Jones, op.cit., p.51.

5 Chiefs Ekpekpei and Aborosan.

marriage of any of his daughters<sup>1</sup>.

(c) Inheritance rights of children of the marriage

Generally speaking, the children of a "small dowry" marriage have no rights of inheritance in respect of their father's estate<sup>2</sup>; but must, as will be apparent later, look to their mother's family for such rights. This lack of rights on the part of the children arises from the incidents of the type of marriage contracted by their parents as well as the rules relating to affiliation, under which they belong to their mother's family.

The result is that the property of a man survived only by children of this type of marriage is distributed as if he had died without issue. His brothers and other relatives then take more or less in the same manner as that already considered in connection with the relevant rules observed by the Isoko, Itsekiri and Urhobo.

When the children may inherit from their father

The rule that the children of a "small dowry" marriage do not inherit from their father is subject to one or two exceptions, which, however, apply differently among the Etsako and Ijaw.

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1 Thomas, (1910), pt.1, pp.56 and 81; Chiefs Ekpekpei and Aborosan.

2 Thomas, (1910), pt.1, pp.54 and 80 ff; Thomas, (1910), 11 J. Comp.Leg. (N.S.) 94 at p.97; Rowling, loc.cit.; Bradbury, op.cit., pp.106-7; Report of the Committee on bride price, op.cit., para.234; Williamson, (1962) 32 Afr. 53 at pp.55-6; Chiefs Ekpekpei and Aborosan.

Among the Etsako, a man's children of an isomi or "small dowry" marriage may be his heirs, if they elect to take up residence in their father's area rather than remain in their mother's family<sup>1</sup>. Similarly, they inherit property from him, if he improves their social position by procuring a title (chieftaincy, otu, etc.) for them<sup>1</sup>.

As regards the position among the Ijaw of the Mid-Western Region, however, the information is that it is usual to accord some rights to such children in respect of their father's movable property, such as articles of clothing and household furniture<sup>2</sup>. But the rights of such children are based on a rule of practice rather than that of the customary law; and informants were at pains to point out that much depended on the attitude of the other relatives of the deceased, of his children of a "big dowry" marriage as well as the extent of the property available for distribution.<sup>2</sup>

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- 1 Thomas, (1910), pt.1, pp.54 and 80-1; Thomas, (1910) 11 J.Comp.Leg. (N.S.) loc.cit; Bradbury, op.cit, p.108. But see: Rowling, ibid, who only indirectly referred to these exceptions by saying: "There are certain devices whereby a husband can obviate the results of this position [i.e. the affiliation and, of course, the inheritance rights of the children]". His further statement thereat, that the children would take their father's property and carry it to their mother's family if he failed to avail himself of the legal devices is, with respect, not correct.
- 2 Chiefs Ekpekpei and Aborosan.

(d) The position of the widow of a "small dowry" marriage

As regards the rights of the heir of the deceased to take over the latter's widow of such a marriage, the Etsako rules on the point differ from those of the Ijaw. For, whereas among the former group, she is free to return to her own family if she had a surviving child for her late husband<sup>1</sup>; among the latter group, she is obliged to marry her late husband's heir or refund part of the bride price, irrespective of whether she had a surviving child for her deceased husband or not<sup>2</sup>.

(B) RIGHTS OF CHILDREN IN RESPECT OF THEIR DECEASED MOTHER'S ESTATE

Quite unlike the succession to a man, a woman's property is generally inherited by her children as joint heirs; irrespective of the type of marriage contracted by her<sup>3</sup>. And barring the local variation under which a brother may be preferred to children<sup>4</sup>, Bradbury accurately states the rule governing children's rights in respect of their mother's property, when he writes: "In either case [i.e. whether she was married under the

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1 Thomas, (1910), pt.1, pp.47 and 72; Thomas, (1910) 11 J.Comp.Leg.(N.S.) 94 at p.96; Thomas, (1910), 10 J.A.S.1 at p.5; Bradbury, op.cit., p.108.

2 Chiefs Ekpekpei and Aborosan.

3 Thomas, (1910), pt.1, pp.83-5; Bradbury, op.cit., p.107; cf. Rowling, loc.cit. Chiefs Ekpekpei and Aborosan.

4 See: Thomas, (1910), pt.1, p.83; Bradbury, op.cit., p.107.

"big dowry" or "small dowry" system of marriage] her children are her heirs...." (1)

(1) Where she is not survived by children

The type of marriage contracted by a woman makes a lot of difference where she dies without issue. We shall take the case of a woman married under the "big dowry" system first.

(a) The estate of a woman married under the "big dowry" system (amoya, braere or ya)

In default of children, the whole of the property of a woman married under the "big dowry" type of marriage goes to her husband or his heir<sup>2</sup>. It is, however, said that there is an instance of local variation among the Etsako permitting the inheritance to go to the husband's other wives married under the amoya system, or to his brother's wives.<sup>3</sup>

(b) The estate of a woman married under the "small dowry" system (isomi, ekiere or egwa)

The rule is that the property of a childless deceased woman, married under the "small dowry" system

1 Bradbury, loc.cit.

2 Thomas, (1910), pt.1, p.83; Rowling, loc.cit.; Bradbury, loc.cit. This is also the position among the Mid-Western Ijaw - Chiefs Ekpekpei and Aborosan.

3 Thomas, (1910), pt.1, loc.cit.; Bradbury, loc.cit.



passes to members of her own family.<sup>1</sup>

### THE IJAW OF KABOWEI (PATANI)<sup>2</sup>

The rules of the Ijaw customary law stated above do not cover those applicable among the Kabowei sub-group of this people inhabiting the area known as Patani. The rules of succession found among this sub-group of the Ijaw people are, to all intents and purposes, the same as those applicable among the Isoko, Itsekiri and Urhobo. Above all, this sub-group do not practise the types of marriage found among the other sub-groups of the Ijaw. The reason for this divergence from the rest of the Ijaw group is generally believed to have been the geographical position of the Patani Ijaw; who are so near the Isoko and the Urhobo with whom they (Patani Ijaw) have always been in close and regular contact.

### SOME MODERN DEVELOPMENTS

The law, as stated in this section, with respect to the types of marriage and the rights of children to inherit from their father, contains much that may be

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- 1 Thomas, (1910), pt.1, pp.83-4; Rowling, loc.cit; Bradbury, loc.cit; Chiefs Ekpekpei and Aborosan.
  - 2 Information on this sub-group has been personally obtained by the present writer from Chiefs J.A.P.Oki, a native and now the Agent-General of the Mid-Western Region in the United Kingdom; and N.K. Porbeni, also a native, sometime Court Registrar (Magistrates' and High Courts) and president of grade "C" customary court, Burutu. This latter Chief is now a Member of the Mid-Western House of Chiefs.

regarded as traditional. It is, therefore, proposed to make some brief observations on the modern tendencies detectable in the actual practice of the people; which may suggest a discrepancy between the way people "think of their institutions and the way they actually work"<sup>1</sup>.

1. Modification of the system of marriage: "small dowry" type now preferred to the "big dowry" type.

That the "big dowry" type of marriage, with the absolute powers it confers upon the husband over his wife, has long ceased to be popular is implied in Thomas's statement made in respect of the Etsako amoya marriage over half a century ago, when he said:

"The amoiya wife is absolutely bound to the husband, and, in fact, in some places only slaves became amoiya wives."<sup>2</sup>

Similarly, and more recently, the committee set up by the Eastern Nigerian Government to investigate bride price in the Region observed inter alia:

"Fathers are today unwilling to give their daughters out on big dowry marriage...." (3)

And more recently still, a writer on the marriage system of the Okrikan Ijaw of the Eastern Region has noted

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1 Williamson, (1962) 32 Afr. 53 at p.60.

2 Thomas, (1910), pt.1, p.54.

3 Eastern Nigeria Government Printer, Report of the Committee on bride price, 1955, para.238.

this unpopularity of the "big dowry" type of marriage, which he has ascribed to certain causes.<sup>1</sup> These include the disintegration of the 'house system' which the "big dowry" marriage was designed to safeguard; the spread of education and the emancipation of women; the gradually shifting notion of the family from that based on the agnatic system of old to the modern primary or biological one, consisting of a man, his wife (or wives), and children; and the realisation that children are now a responsibility, and must not only be maintained but also educated<sup>1</sup>. There is also the fact that the bride price in respect of the "big dowry" marriage has always been prohibitive until the recent legislation passed by the Eastern Nigeria Government.<sup>2</sup>

One result of these changes has been the ascendancy of the "small dowry" type of marriage over the "big dowry" type; and it is no exaggeration when the Committee on bride price observe that:

"...small dowry marriage is the commonest form today."<sup>3</sup>

2. The inheritance rights of children in respect of their father's estate.

As a result of the changes in the marriage pattern

1 Williamson, op.cit. pp.58-9.

2 The Limitation of Dowry Law, No.23 of 1956.

3 The Report of the Committee on bride price, op.cit., para.41.

outlined above, the rules of inheritance with respect to the rights of children to their father's estate have undergone some modification.

It has already been observed that the Etsako rules have legal devices, under which a man may make his children his heirs, notwithstanding that they are the issue of a "small dowry" or isomi marriage. Similarly, we have seen that it is the Ijaw practice (though not the rule of the customary law) to permit the children of a "small dowry" or ekiere marriage to take some share in their deceased father's movable property.

One of the recommendations of the Committee on bride price was the abolition of the rule depriving children of a "small dowry" or egwa marriage of the right to inherit from their father<sup>1</sup>. The Committee was of the view that "all should be equal before the law"<sup>1</sup>. It is a matter for regret, however, that nothing has so far come out of this humane recommendation. But there is still some consolation: the courts will be prepared to do what the legislature is unwilling to tackle; and Williamson records a case where a son of a "small dowry" marriage successfully sued his father's family for a

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1 Ibid, para.8.

share of his inheritance<sup>1</sup>. The greatest obstacle to the desired change would seem, however, to be the attitude of the children of this marriage, who are said "to sway to where the power is, that is, incline to their mother's or father's family according to which is more powerful" (1).

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1 Williamson, op.cit., p.59.

## CHAPTER TWELVE

### RIGHTS AND DUTIES OF THE HEIR

#### Scope of inquiry

As in the preceding five chapters, this chapter is devoted almost exclusively to a consideration of the rules governing the rights and duties of the heir in societies inhabiting the Mid-Western Region; with the qualification that the relevant rules of the kindred groups found outside the Region, such as the Ibo and Ijaw of the Eastern Region, are also considered. The rules of the Yoruba customary law may, however, be referred to where this is necessary for the purposes of comparison or elucidation.

The topic will be only briefly treated, since much of it has been anticipated in an earlier chapter dealing with the rights, duties, powers and liabilities of the administrator; where it has been observed that the heir is nearly always also the administrator, i.e. administration follows the interest.

The class of heir, whose rights and duties will be discussed, is the sole or principal heir. This is because only this type of heir normally steps into the deceased's shoes; while the subsidiary heir is merely required to use his share of the property in providing as much as possible for himself.

## Duties

Consideration of the duties of the heir is placed before that regarding his rights in order to stress the fact that customary succession is not confined to the acquisition of rights; but involves the assumption of corresponding duties on his part.

Almost all the duties of the heir have been summarised by an author who, writing on the inheritance rules of the Edo-speaking peoples, states:

"The duties associated with inheritance are few. The deceased is buried by his heirs, and conversely. The man who buries a debtor or heirless man takes over debts or property, as the case may be. The duty of sacrificing to the dead man falls upon his children ..... In certain cases the first-born has duties towards his brothers .... As a matter of course the sister remains with her brother till marriage....." (1)

Adding a little to the author's statement of the law quoted above, we may list the duties of the heir as including the following, that is to say:

- (1) burial and funeral of the deceased;
- (2) setting up worship of the deceased as an ancestor;
- (3) payment of the debts owed by the deceased; and
- (4) maintenance of the dependants of the deceased, such as wives, children and others to whom he stood in loco parentis.

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1 Thomas, Anthropological report on the Edo-speaking peoples (1910), pt.1, p.78.

(1) Burial and funeral of the deceased

The heir bears all or the major share of the expenses of the deceased's burial and funeral<sup>1</sup>; just as, as we have seen, he takes the whole or the substantial part of the deceased's property.

As a rule, this responsibility for the deceased's burial and funeral is nearly always unhesitatingly undertaken by the heir; and this is not surprising. Firstly, as has been shown, he is either the sole or principal beneficiary of the deceased's estate. Secondly, the law permits the expenses involved in the performance of a man's burial and funeral to be charged against his estate<sup>2</sup>. Thirdly, there is the popular belief that failure to

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1 The authorities on this are prolific. The following may be referred to: Thomas, "Some Ibo burial customs", (1917) 47 J.R.A.I. 163 at pp.185 ff; Thomas, (1910), pt.1, p.78; Thomas, Anthropological report on Ibo-speaking peoples (1914), pt.IV, pp.128 and 165; Thomas, "Notes on Edo burial customs" (1920) 50 J.R.A.I. 377 at pp.384 ff; Welch, "The Isoko tribe" (1934) 7 Afr. 160 at p.172; Meek, Law and authority in a Nigerian tribe (1937), pp.314 and 320; Egharevba, Benin law and custom (1949), p.39; Bradbury, The Benin kingdom (1957), pp.47, 50, 80, 98, 108, 124 and 159; Okojie, Ishan native laws and customs (1960), pp.64, 69, 89-91 and 127; and the recent Benin case of Iyamuse Ehigie v. Gregory Ehigie [1961] All N.L.R.842 at p.845; [1961] W.N.L.R. 307 at p.309.

2 Meek, op.cit., p.320; Omoneukanrin, Itsekiri law and custom (1942) p.67; Okojie, op.cit., pp.69 and 124. This is implied in the Yoruba case of Salami v. Salami and anor. [1957] W.N.L.R.10 at p.11. For the position in southern Nigeria generally, see: Talbot, The peoples of southern Nigeria (1926), vol.III, p.474.



accord the deceased burial and funeral is dangerous to his living relatives, especially to the heir who is primarily responsible for the performance of these rites<sup>1</sup>. Fourthly, there may be a diminution in the social position and prestige of the heir, and through him the deceased's family, if these essential rites are not carried out<sup>2</sup>. These considerations making for the inevitable performance of the deceased's burial and funeral ceremony have been vividly stated by a learned author on Ibo law, who writes:

"If the eldest son is sufficiently grown-up to carry out the burial rites of his father, an expensive duty, he is entitled to recoup himself from his father's estate. Indeed, one of the principal reasons for giving the eldest son a larger share of the inheritance than his brothers is to enable him to perform this primary duty.. a man's foremost duty in life is to see that his father or brother is buried ... This is not merely a pious act. It is done in order to avoid pursuit by the dead man's ghost. It also confers a social status on the person performing it - the more elaborate the burial rites the more important the performer becomes in the eyes of the people. No more abusive remark can be made to a man than 'You never even killed a rat for your father's funeral!'" (3)

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- 1 Basden, Among the Ibos (1921), p.121; Basden, Niger Ibos (1938), pp.201, 269 and 280; Thomas, (1920) 50 J.R.A.I. 377 at p.381; cf. Okojie, op.cit., p.64. Also Meek, op.cit., pp.318 and 321, and especially p.319; where he says that relatives failing to perform these rites for the deceased are said to "have roasted" him.
  - 2 Welch, "The Isoko tribe" (1934) 7 Afr. 160 at p.172; Omoneukanrin, Itsekiri law and custom (1942), p.69; Egharevba, op.cit., p.73; Okojie, op.cit., p.124; and also Meek, op.cit., p.321.
  - 3 Meek, op.cit., pp.320-1.

(2) Worship of the deceased as an ancestor

Under strict customary law, the heir is under a duty to erect a shrine or altar in honour of the deceased soon after the latter's burial and funeral rites have been performed<sup>1</sup>. Thereafter, he is bound to make offerings, consisting of animals, food, drinks, etc., to the dead man at the shrine or altar at least once a year<sup>2</sup>. In the case of a son succeeding a father who was an important chief or other titled man, such annual worship is known as "making the father".<sup>3</sup>

Among its adherents, ancestor-worship is practised not merely as an act of showing filial piety; but is based on their conception of the deceased as a spirit, who is regarded as capable of exercising far greater influence over the living relatives than was possible when he was alive. Thus, Bradbury states:

"Offerings, including kola, palm-wine, chalk and pounded

1 Thomas, (1910), pt.1, p.37; Thomas, "The Edo-speaking peoples" (1910), 10 J.A.S.1 at p.12; Thomas, (1914), pt.IV, p.27; Bradbury, op.cit., pp.29-30 and 54.

2 See generally the authorities cited in footnote 1 above. Also: Roth, H.L., Great Benin (1903) pp.101-2; Meek, op.cit., pp.104 ff and 119 ff; Thomas, (1910), pt.1, p.78; Egharevba, op.cit., p.86; Bradbury, op.cit., pp.55-6; Lloyd, "The Itsekiri" in the Benin kingdom (1957), ed. Bradbury, pp.184 and 201; Okojie, op.cit., pp. 50 and 146 ff.

3 See: Glanville and Roth, F.N., "Notes on the Jekris, Sobos and Ijos of the Warri District" (1898-9) 28 J.R.A.I. 104 at p.112; Roth, H.L., Great Benin (1903) p.102; Anon. "Notes on the form of the Bini government", (1904) 4 Man 50 at p.53; Rumann, "Funeral ceremonies for the late ex-Oba of Benin" (1914) 14 J.A.S. p.35.

yam are made regularly and are accompanied by prayers for the welfare of the members of the family. In times of sickness and other catastrophes goats and fowls are sacrificed". (1)

No heir takes lightly the duty of worshipping the deceased. For, apart from the traditional fear of the supernatural powers ascribed to the dead man, this form of worship places him (the heir) in the position of an intermediary between the ancestors and the living members of the family; and helps to establish and maintain his authority as the new head of the family. It follows from this that any act of disrespect shown to the new head of the family by a member is viewed as having been directed at the deceased and, through him, the powerful band of ancestors. This point has been clearly brought out by a learned author who says:

"If he [i.e. the head of the family] is displeased with one or more of the family he may, when offering sacrifice, ask the blessing of the ancestors 'for those of the family who are right minded', and this reservation would cause disquietude or even alarm among those with whom he had quarrelled". (2)

MODERN DEVELOPMENT: INFLUENCE OF THE CHRISTIAN AND OTHER RELIGIONS ON THE CULT OF ANCESTORS

The account given above in connection with the duty

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1 Bradbury, op.cit., p.55. Cf. Thomas, (1910), pt.1, p.78.  
 2 Meek, op.cit., p.105. Cf. Okojie, op.cit., pp.146 ff.

of the heir to offer sacrifices to the deceased represents, in the main, the position under strict orthodox customary law. Today, the position has changed and is changing; the duty of the heir in this regard is often completely ignored or only vicariously performed.

The main cause of this change has been the spread of the Christian and other religions, such as Islam, whose tenets are fundamentally opposed to belief in the cult of ancestors.<sup>1</sup> While those propagating the teachings of these religions have every reason to welcome rather enthusiastically the decline in the once-powerful influence attributed to the departed ancestors, the resulting position is not one of unmixed blessing. For one thing, the solidarity of the family in its extended or agnatic connotation is thereby threatened. For the other, the disappearance of this once-restraining influence lies at the root of the modern tendency on the part of heirs to treat succession solely as a source of acquiring rights; while ignoring the duties attaching to it under traditional customary law. It is, therefore, little wonder that a recent author on the customary law of the Ishan people has decried the modern development in this way:

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1 See, for example: Meek, op.cit., pp.106 ff, 199, 259 and 333; Green, Ibo village affairs (1947) pp.52-3; Okojie, op.cit., pp.99 and 148; Legum, C., "Great Benin", (1960) 66 Nigeria 103 at p.109.

"Today with the growth of Christianity and other religions .. ancestral worship and our way of social life is being forgotten and relegated to the background. The family unit with its spiritual binding is disintegrating, Ishans are becoming more individualistic...." (1)

Where the heir is a follower of the Christian or other religion opposed to ancestor-worship: manner in which the duty to offer sacrifices to the deceased is performed<sup>2</sup>

If the heir is an ardent follower of the Christian or other religion, such as Islam, which equates ancestor-worship with idolatry, the duty requiring him to set up an altar or shrine for the worship of the deceased is ignored. It is, however, usual for another member of the family, who is a pagan, to elect to perform this duty; and to be personally responsible for the cost of procuring the provisions to be used in such sacrifices. But such a member of the family does not thereby come under a legal obligation to continue the offering of sacrifice to the dead man: it is merely a moral or social duty, which is undertaken in order to secure, as has been stated, the goodwill of the deceased towards his living relatives. It will be appreciated that, as the recipient of the acts of filial piety involved in ancestor-worship, the deceased, during his lifetime must have discouraged his heir from embracing any religion that forbids this quaint form of

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1 Okojie, op.cit., p.148.

2 Information supplied by nearly all the informants interviewed by the present writer, and mentioned in sundry places in this work.

worship. And it has been stated that among the Bini, there is nearly always some difference and friction within the family on the conversion of a member into Christianity; since it is not at all easy for the convert to answer the obvious question: "Who will feed the spirit of your parents after they are dead..?" (1)

Perhaps the most interesting aspect of the modern development as regards ancestor-worship has been the vicarious discharge of the duty of the heir to make offerings to the deceased. It sometimes happens that an heir who has adopted Christianity or other religion having no truck with the cult of ancestors, nevertheless has, what has been aptly termed "partial belief in juju"<sup>2</sup>; and while he may not personally make the sacrifices to the dead man, he is anxious to secure someone else who may officiate for him in the performance of these rites. It should be observed that in such a case, the officiant is merely an agent of the heir: the latter, not the former, must bear the expenses incurred with respect to the materials - animals, food, drinks, etc. - required for the worship.<sup>3</sup>

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1 Legum, C., loc.cit.

2 Okojie, op.cit., p.148.

3 All the informants interviewed and mentioned in this work are agreed on this aspect of the modern development.

(3) Payment of the debts owed by the deceased

The heir is responsible for the payment of all or the major share of the debts owed by the deceased, depending upon whether the former is the sole heir or only a principal heir<sup>1</sup>.

It should be borne in mind that customary law knows nothing of any rule of limitation under which a debt may be extinguished by lapse of time<sup>2</sup>. Consequently, the duty of the heir now under consideration is not limited to meeting the debts personally contracted by the deceased himself; but it extends to the settlement of any that may have been passed on to the latter by successive ancestors, who lived several generations ago. The plight of an heir having to pay ancient debts- the mode of payment

- 1 Thomas, (1910), pt.1, p.100; Thomas, (1914), pt.IV, pp.165 ff; Basden, Among the Ibos (1921), p.85; Basden, Niger Ibos (1938), p.268; Talbot, The peoples of southern Nigeria (1926), vol.III, p.633; Meek, Law and authority in a Nigerian tribe (1937), p.234; Harris, J.S. "Some aspects of the economics of sixteen Ibo individuals" (1944), 14 Afr. 302 at p.320; Omoneukanrin, op.cit., p.73; Egharevba, op.cit., p.74; Bradbury, op.cit., pp.120 and 152; Okojie, op.cit., p.92.
- 2 Thomas, (1910), pt.1, p.98; Thomas, (1914), pt.IV, p.164; Basden, (1921), loc.cit.; Basden, (1938), loc.cit.; cf. The Limitation Law, Western Region, cap.64, s.1(2), Laws of the Western Region (1959) which states: "Nothing in this Law affects actions in respect of ... any matter which is subject to the jurisdiction of a customary court relating to ... inheritance or disposition of property on death."

of which may have changed beyond all recognition over the years - has been succinctly described by an author on Ibo law. He states:

"The settling of ancient debts - perhaps three generations old - is a very intricate business, and a young man may find himself in an undesirable and even critical position, owing to his being suddenly confronted with a debt contracted years before by his grandfather, the repayment of which has not become easier by lapse of time - the money-lender sees to that". (1)

And, elsewhere, the same author says:

"In the olden days the debt was paid in kind; nowadays, it is expected that the refund will be made in cash, a vastly different proposition". (2)

Meek, however, seems to be of the view that lapse of time may bar the repayment of a debt; for, he says:

"But if a creditor did not give notice of the debt before the conclusion of the final funeral rites he lost all claim to repayment". (3)

It is submitted that this view does not accurately represent the customary law which is as stated above. The learned author's assertion does not take into account the position of the deceased's creditor who may not have got timely knowledge of his debtor's death; and who is bound to suffer injustice on this view of the law. Besides, the true position under customary law - i.e. the absence

1 Basden, Among the Ibos (1921), p.85; also Basden, Niger Ibos (1938) p.268.

2 Basden, Niger Ibos (1938) loc.cit.

3 Meek, loc.cit.



of any rule under which lapse of time may extinguish a debt - has received statutory recognition in the Limitation Law of the Western Region<sup>1</sup>, which provides:

"Nothing in this Law affects ... any matter which is subject to the jurisdiction of a customary court relating to ... inheritance or disposition of property on death".(2)

It cannot, of course, be argued that the payment of the deceased's debts is not a matter "relating to inheritance or disposition of property on death".

As a general rule, the heir must still pay the debts of the deceased, notwithstanding that these exceed the value of the estate, and render it a damnosa hereditas<sup>3</sup>. Among the Ishan, however, he may apparently divest himself of the liability to pay the deceased's debts by refusing to inherit the estate, usually an insolvent one<sup>4</sup>. When this happens, the local ruler (onojie or onogie) takes over the property of the deceased; but without the obligation to pay the latter's debts, since no creditor may seek to enforce the repayment of his debts in these circumstances<sup>4</sup>.

The last point that may be considered in connection

1 Laws of the Western Region of Nigeria (1959), cap.64.

2 Op.cit., s.1(2).

3 Thomas, (1914), pt.IV, p.165; Omoneukanrin, op.cit., p.74. Confirmed by all informants mentioned in sundry places in this work.

4 Okojie, op.cit., p.92; but see pp.94 ff and 109 ff, where the author states that this and other autocratic powers and privileges of the local ruler are no longer exercised by him.

with settlement of the debts of the deceased is the lot of a creditor whose claim the heir is unable to meet. All informants interviewed by the present writer during his field investigation say that heirs nearly always pay up in order to save the name and status of the deceased and his family; and that, where circumstances render it difficult to pay the deceased's debts all at once, payment by instalments is generally agreed upon. In practice, however, the other members of the deceased's family do not stand idly by and allow the heir to be harassed by the creditors of the deceased. But the primary liability to pay these debts rests with the heir; or, if he is only a principal heir, the liability becomes joint in respect of all those who have benefited from the estate left by the deceased. The obligation of the family to help in the payment of the debts incurred by the deceased member rests on the principle of secondary liability, since they were liable for his wrongs while he was alive.<sup>1</sup> For, as Kingsley

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1 See for instance: Thomas, (1910), pt.1, pp.99-100; Thomas, (1914), pt.IV, p.161; Basden, (1938), p.254 and 261; Talbot, (1926), vol.III, pp.632, 635, 650-3, 655-7 and 662; Meek, op.cit., pp.207 and 230; Elias The nature of African customary law (1956), pp.87-92 and 137. Kingsley, M.H., West African studies (1899) p.436.

puts it:

"Every person is the member of a family, and all the other members of the family are responsible for him and he to them". (1)

(4) Maintenance of the dependants of the deceased

The heir has the obligation to maintain the dependants of the deceased; be they the wives or children of the deceased, or others to whom he stood in loco parentis. We shall first take the duty of the heir to maintain the dead man's widows.

(a) Widows

The heir's duty in this connection is one that sounds more onerous in prospect than in actual performance. Several factors operate to lessen the burden associated with the heir's duty to maintain the deceased's widows. Firstly, as has been stated, some of the widows are taken as wives by the other kinsmen of their late husband. Where this is the case, the obligation to maintain these women is assumed by their new husband or husbands, and not by the heir<sup>1a</sup>. Secondly, even where the heir has

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1 Kingsley, loc.cit.

1a This is because it is the duty of a husband to provide for his wife or wives. On this see: Thomas, (1914), pt.IV, p.140; Thomas, (1910), pt.1, pp.47 ff; Meek, op.cit., pp.100-2 and 202; Green, Land tenure in an Ibo village (1941) pp.13-14; Green, Ibo village affairs (1947), p.34; Spörndli, J.I., "Marriage among the Ibos" (1942-5), 37 Anthropos 113 at p.118; Harris, (1944) 14 Afr. 302 at p.328; Jones, G.I., "Ibo land tenure" (1949)

taken some of the widows as wives, his duty to maintain them is no higher than the normal obligation on the part of a husband to co-operate, as we have seen, in providing for his wives. It should be appreciated that the women themselves are not idle; their activities in connection with farming and petty trading may, as has been pointed out in chapter six (on administration), supply much, if not all, of their needs as regards food and clothing. It will have been seen, however, that the best guarantee with respect to the maintenance of the widows is offered by the custom whereby they are taken as wives by the deceased's heir or some other members of their late husband's family - a point which has already been made, where, however, it was observed that the custom has been steadily falling into disfavour. Thirdly and lastly, the obligation of the heir in this regard consists largely in the negative duty of allowing the widows to continue the enjoyment of whatever provisions the deceased may have made for them during his lifetime. For instance, they are entitled to remain in occupation of their living apartments in the deceased's house; to retain possession of the plots of land allotted to them by him for their farming purposes;<sup>2</sup>

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1a .....19 Afr. 309 at p.315; Ardener, E.W., "The kinship terminology of a group of southern Ibo" (1954) 24 Afr. 85 at p.88; Talbot, The peoples of southern Nigeria (1926), vol.III, p.678.

and, as among the Ibo, to enjoy the produce of their husband's economic trees<sup>3</sup>.

The duty of the heir to maintain the widows, like that of the administrator during the period of administration, is owed to only such widows who marry within the family; or who, while not so married (where they are old or no eligible husband has been found, for instance), elect to live the rest of their lives in association with the family. It is not owed, for example, to a widow refusing to marry a kinsman selected by the family to take her as wife. She is regarded as wanting to marry outside the family, and, therefore, not entitled to maintenance by them.

It should be noted that the allotment of residential accommodation by a husband to his wife and the subsequent arrangement whereby she continues in possession

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- 2 Green, (1947), loc.cit.; Obi, The Ibo law of property (1963), pp.73 ff, 173-4 and 183; Okojie, op.cit., p.102. Also the Yoruba case of Omoniregun v. Sadatu (1888) R. C.J.15; noted by Stopford, J.G.B., "Glimpses of native law in West Africa" (1901) 1 J.A.S.80 at pp.85-6. See also Lopez and ors. v. Lopez and ors. (1924) 5 N.L.R. 47 at pp.49-50, where the case was considered. In Lopez and ors. v. Lopez and ors. op.cit., however, the issue was the partition of family land; and it was stated that the rights of female children were inferior to those of males. Note, however, that this decision is no longer good law, which is to be found in Lewis v. Bankole (1909) 1 N.L.R.82 at p.96; Sule and ors. v. Ajisegiri (1937) 13 N.L.R.146 at p.147; Salami v. Salami and anor. [1957] W.N.L.R.10; i.e. the rights of children are equal under Yoruba customary law, irrespective of sex.
- 3 Green, Land tenure in an Ibo village (1941) pp.20 ff; Obi, The Ibo law of property (1963) pp.98 and 159.

thereof do not operate to vest such property in her; which she may pass on to the members of her family in the event of her dying without issue. This point was decided in the Yoruba case of Oloko v. Giwa<sup>1</sup>, where the deceased's son and principal heir successfully sued his younger brother for recovery of possession of a room, which was allotted by the deceased to the mother of both parties. The defence, strangely enough, was that the allotted room vested in the mother of the parties; and that the defendant could not be ordered to give up possession on the ground that it became the joint property of both parties on the death of their mother, to whom it belonged by the process of allotment. By far the strangest feature of the case, however, related to the availability and willingness of a defence witness, who supported this strange contention; and who was disowned by counsel on his side. Graham Paul, J., who decided the case, was so struck by this novel contention that he was forced to observe:

"I have heard a good deal of nonsense talked in the witness box about Yoruba custom but seldom anything more ridiculous than this. Even the defendant's Counsel himself had to throw over his witness, and I really do not blame him for that". (2)

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1 (1939) 13 N.L.R.31; cf. Dosunmu v. Dosunmu (1954) 14 W.A.C.A. 527.

2 Ibid, at p.33.

### The widower

As regards the widower, it is enough to repeat what has been said in the chapter on the administration of estates and say that he is not entitled to be maintained by the heir. It is, of course, the case, as has been pointed out, that he enjoys rights in respect of his wife's post-nuptial acquisitions under some systems, if the woman leaves no surviving children<sup>1</sup>.

### (b) Children and others to whom the deceased stood in loco parentis

One consequence of the heir succeeding to the whole or substantial part of the deceased's estate is that he is placed in the position of a father and guardian as regards the minor children and others for whom the dead man was responsible. This imposes on the heir the duty to maintain and support these dependants of the deceased.

The obligation of the heir in this connection has been reiterated in both the Urhobo case of In the estate of Agboruja<sup>2</sup> and the more recent Benin case of Iyamuse Ehigie v. Gregory Eghigie<sup>3</sup>. In the earlier case<sup>2</sup>, Ames, Ag.S.P.J., said, inter alia:

"When there are minor children it means that the father's heir becomes their new father". (2)

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<sup>1</sup> See chapters eight, nine and eleven.

<sup>2</sup> (1949) 19 N.L.R.38.

<sup>3</sup> [1961] All N.L.R.842; [1961] W.N.L.R.307.

In the Benin case of Iyamuse Ehigie v. Gregory Ehigie<sup>1</sup>, Obaseki, president of the grade "A" customary court (Benin City), as he then was<sup>2</sup>, observed:

"The responsibilities for the care of the household and upbringing of the younger children of the deceased also pass to the eldest son [i.e. the heir] until they are of age. His position becomes that of the father of the family". (3)

The heir must permit these dependants to reside with him in his inherited property, and provide for their feeding and general welfare<sup>4</sup>. Nowadays, he must bear the expenses of their formal education at school or other institution of learning. In addition, he must help to provide the bride price in respect of the first

1 [1961] All N.L.R. 842; [1961] W.N.L.R. 307.

2 The former president has since the 2nd April, 1964, become a Judge of the High Court of the Mid-Western Region. See M.N. Notice No.80 of 1964.

3 [1961] All N.L.R. 842, at p.845; [1961] W.N.L.R.307 at p.309.

4 On this see generally: Thomas,(1910), pt.1, pp. 68 ff and 86-6; Thomas, "Marriage and legal customs of the Edo-speaking peoples" (1910) 11 J.Comp.Leg. (N.S.) 94 at p.99; Thomas, (1914), pt.IV, pp.127-8; Talbot, The peoples of southern Nigeria (1926), vol.III, p.677; Meek, Law and authority in a Nigerian tribe (1937) p.320; Bradbury, The Benin kingdom (1957), pp. 46-7; Okojie, Ishan native laws and customs (1960), p.91.



marriage contracted by any of the deceased's sons<sup>1</sup>; and see to it that such a married son is established in life. As regards the unmarried daughters of the deceased, he has the obligation to ensure, by making adequate allowance out of the bride price received by him, that the necessary outfit consisting of household utensils, food, clothes, ornaments and cash - dowry in the English sense of the word - is provided for any of them on the occasion of her marriage<sup>2</sup>.

#### THE RIGHTS OF THE HEIR

As has been noted in the chapters on the distribution of estates, the heir succeeds to the whole or the

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- 1 Thomas, (1910), pt.1, pp.70 ff; Thomas, (1914), pt.IV, p.127; Talbot, loc.cit.; Meek, op.cit., pp.320-1; Bradbury, op.cit., pp.47 and 120; Okojie, loc.cit. It will be appreciated that the duty of the heir in this regard is one of the obligations he has inherited from the deceased who would have provided the bride price with regard to the first marriage of each of the sons. On this, see: Meek, op.cit., p.267; Harris, "Some aspects of the economics of sixteen Ibo individuals" (1944) 14 Afr. 302 at p.304; Bradbury, op.cit., pp.30 and 48.
  - 2 His duty here is to give part of the bride price to the bride's mother, who then sees to the arrangement of providing the marriage outfit for her daughter. The bride's mother also has a duty with respect to the provision of such outfit. On her duty, see: Welch, "The Isoko tribe" (1934) 7 Afr. 160 at p.171; Meek, op.cit., p.267; Omoneukanrin, op.cit., p.42; Leith-Ross, African women (1938) p.102; Green, Ibo village affairs (1947) pp.97 and 161; Bradbury, op.cit., p.158.

major share of the property of the deceased, recognised by the law as being transmissible on intestacy; unless this is varied by the latter's will. In other words, the sole heir takes over the deceased's rights and interests in toto; while the principal heir succeeds to the substantial part of these rights and interests. It will be appreciated, therefore, that the topic of the rights of the heir is really another way of looking at the nature of the rights and interests comprised in the deceased's estate - a subject which has already been treated in an earlier chapter.<sup>1</sup> For this reason, this section dealing with the rights of the heir will be brief.

Rights of heir over inherited property compared with his rights in respect of his self-acquired or individual property

A distinction is sometimes made between the property inherited by the heir and that which he has acquired by what may be termed his "unaided" or "individual" efforts. The basis of this distinction seems to be that, while he may dispose of, or do what he likes with, his self-acquired property; he is fettered in the use and enjoy-

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1 See chapter seven, at pp.259 ff.

ment of inherited property, which must descend according to predetermined rules. Thus, Talbot says:

"The property may be said to be left to him [i.e. the heir] in trust for the family, and is rarely regarded as personal; everyone in the house has a claim on it!"<sup>1</sup>

Similarly, it will be recalled that the successor under Akan law, who is appointed by the deceased's family to take charge of the property comprised in the estate, does not possess the rights of an absolute owner in respect of the property of which he is appointed a manager or custodian<sup>2</sup>.

Concerning the position in our area of special reference, however, it is proposed to make some comments on this distinction and to state, with respect, why it must be regarded as untenable in all cases of inheritance in which the estate has been formally distributed.

Firstly, it is hoped that the advocates of this distinction do not have in mind the rights enjoyed by the deceased or his heir by virtue only of the membership

1 Talbot, The peoples of southern Nigeria (1926), vol.III, p.677.

2 See chapter seven, at p.257, footnote 4; also Allott, "Marriage and internal conflict of laws in Ghana" [1958] J.A.L. 164, at p.179; Allott, Essays in African law (1960), p.239; Ollennu, N.A., The law of succession in Ghana (1960), pp.7-12, and the authorities cited therein.

of a group, like the family or village, holding and controlling the totality of rights in the property of the group, such as land. For, if this is the case, the short answer is that there simply is no question of inheritance here. This is because neither the deceased nor, indeed, any member has any rights or interests in the property which are separate and distinct from the general ones enjoyed by every member of the group; and which he may use as he likes or transmit to his heirs on his death intestate. Every member of the group, be it the family, the village or some wider community, accedes to his rights of user and enjoyment of such property on birth; and when he dies, these become available for reallocation among the living members of the group. The following observation made by a learned writer affords support to our view:

".... unless there is private property owned and possessed by individuals, the question of inheritance hardly arises. For whereas an individual dies and his property, if he has any, has to be disposed of ....., a group, such as a clan or tribe or family, does not die. Members die and are replaced by new members in the common enjoyment of the property of the group ..... Under such conditions there is no inheritance .... The group holds in common ... The individual does not hold but only shares in the use; and accordingly, when he dies, there is nothing for

anyone to inherit"<sup>1</sup>.

It must, however, be pointed out that in practice, the group may, and often does, accord the heir of a deceased member the preferential right of continued user with respect to that part of the property that was under the dead man's exploitation during his lifetime. But such an arrangement, based upon the needs of the group as a whole and the circumstances and extent of the property concerned, must not be confused with the more important question of the ultimate title to such property, which is vested in the group. Perhaps, one of the clearest statements of the customary law on this point is that made in the Yoruba case of Taylor v. Williams and anor.<sup>2</sup> by Graham Paul, J., who observed:

"... the correct view is at any moment that the ownership

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1 Cole, G.D.H., "Inheritance", in the Encyclopaedia of the Social Sciences (1948), vol.VIII, p.35. But see: Elias, Nigerian land law and custom (1962), pp.152 and 166; and Elias, Nature of African customary law (1956) where the author states that children have rights of inheritance in respect of their parents' interests in family property. With the greatest respect, the learned author's view is untenable. While on the topic of group interests, however, it must be observed that the rights of administering or controlling such property may form the subject of inheritance. On this, see: Meek, Land tenure and land administration in Nigeria (1957) p.178n; Lloyd, "Some notes on the Yoruba rules of succession ..." [1959] J.A.L. 7 at p.11; Lloyd, Yoruba land law (1962), p.283.

2 (1935) 12 N.L.R.67.

of the family property is vested in the whole family ... That individual right of user is ... purely and simply a life interest ..... the family will generally permit his or her children to have among them the same user as their parent had if the circumstances of the family and of the property permit." (1)

Secondly, the distinction between the property inherited by the heir and that which he has personally acquired does not hold in the case of a sole heir who, as has been seen, succeeds to the whole of the property of the deceased. It will be recalled that such an heir stands in the position of an absolute owner to the inherited property; subject only to his moral, not legal, obligation to give some share of such property to his younger brothers and sisters, especially those of them who have assisted him in the performance of the burial and funeral rites of the deceased. At the risk of being charged with the fault of repetition, we may quote again the relevant passage occurring in the Benin case of Iyamuse Ehigie v. Gregory Ehigie<sup>2</sup>, where the president of the grade "A" customary court, Benin, said:

"However, whenever the deceased leaves a lot of property, it is the usual practice for the eldest male child[i.e. the sole heir] who performs the funeral ceremonies to .. give his brothers and sisters who have made satisfactory substantial contribution to the burial some share of the

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1 Ibid., at p.70.

2 [1961] All N.L.R.842; [1961] W.N.L.R.307.

property. He has a discretion in the matter."<sup>1</sup>

Thirdly, the distinction made in this connection breaks down in respect of inherited property of which there has been partition - a mode of division which vests in each of the joint heirs the absolute title to his share<sup>2</sup>.

The only instance in which this distinction may be validly drawn is where the joint heirs enjoy their rights in respect of the inherited property in common. In this case, the rights possessed by individual joint heirs are decidedly inferior to those they exercise in relation to their own self-acquired property; or those they enjoy in respect of their specific shares of the estate on partition. This is because until there has been partition, the estate is family property, in respect of which no one of the heirs has a separate and alienable interest<sup>2</sup>.

1 Ibid, at p.845; and p.309, respectively.

2 On the nature of the rights of members in respect of family property, and on these rights where partition of such property has been effected, see: Coker, Family property among the Yorubas (1958) chaps.3-9; Lloyd, "Some notes on the Yoruba rules of succession..." [1959] J.A.L.7 at pp. 11 ff; Lloyd, "Family property among the Yoruba" [1959] J.A.L.105 ; Lloyd, Yoruba land law (1962), chaps 4, 9 and 11; Elias, Groundwork of Nigerian law (1953), chaps.16-18; Elias, Nigerian land law and custom, 3rd edn. 1962, chaps. 7 and 10; also the decided authorities discussed in these works.

What then are the rights of the heir in respect of the property he has inherited? Are his rights like those of an absolute owner or are they no higher than those of a mere controller or caretaker of property owned by the group, the family, for example? The answer is that the heir inherits the whole or substantial part of the estate - according as he is a sole or principal heir - in his own right and as an absolute owner; unless, in the case of a principal heir, the inherited property is treated as family property and is enjoyed as such. The fact that he has obligations, already considered, towards the dependants of the deceased does not reduce the rights of the heir over the inherited property to those of a mere controller or caretaker. For, while he was alive, the deceased owed similar obligations to his dependants; but, he nevertheless occupied the position of absolute owner in relation to those rights and interests which are by law transmissible to his heirs on his intestacy. Furthermore, to argue that the duty of the heir to maintain the deceased's dependants limits his rights over the inheritance in such a manner that he is no more than a caretaker of the inherited property is to say that he has no obligations in this regard, if the dead man's estate were insolvent; which is, of course, not the case. As



the new head of the family, he is still the guardian and 'father' of the young children of the deceased; and must do his best to maintain and support all members who are in need.

Summarising the position, we may state that where there has been formal distribution, the rights of the heir over his inherited property are like those possessed by the absolute owner. They are co-extensive with those which the deceased exercised over the property comprised in his estate. It will be recalled that the rights of the deceased, collectively termed the assets of his estate, have been examined in chapter seven to which the reader is referred for a detailed discussion.

#### WHERE THE HEIR IS A MINOR: GUARDIANSHIP OVER HIM

If the heir is himself a minor and so cannot be entrusted with the discharge of his duties considered above, he is placed under the guardianship of some adult person until he comes of age. Such a guardian is usually the brother of the deceased or the head of the family<sup>1</sup>.

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1 Thomas, (1910), pt.1, pp.68 ff and 86-9; Thomas, (1910), 11 J. Comp.Leg. (N.S.), loc.cit.; Thomas, (1914) pt.IV, pp.133 ff; Meek, op.cit., pp.117, 124, 230 and 322; Omoneukanrin, op.cit., p.74; Egharevba, op.cit., p.39; Bradbury, op.cit., pp. 77 and 107; Okojie, op.cit., pp.65, 90-2; Rowling, Land tenure in Benin Province (1948) para. 49; Chubb, Ibo land tenure (1961) para. 39.

But, if there is no close male relative of the dead man; or if the relationship between such relative and the heir is not cordial, a mother may act as guardian to her child<sup>1</sup>.

#### RIGHTS AND DUTIES OF GUARDIAN

It is proposed to take the duties of the guardian first, just as consideration of the duties of the heir was placed before the discussion of the latter's rights. In the case of the guardian, however, his duties are examined before dealing with his rights in order to discourage the tendency on the part of many a guardian, on which we shall make some observations later, to misappropriate the property of the ward.

Guardianship entails three main duties. Firstly, the guardian is to manage the property of the minor heir and ensure that the latter is maintained out of the property or the proceeds thereof<sup>2</sup>. Secondly, it is the duty of the guardian to discharge the obligations incumbent on the heir, which have been considered above. Thirdly and finally, the guardian must hand over any property of his ward in his charge to the heir when the

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1 Thomas, (1910), pt.1, pp.75, 78, 84-5 and 88; Thomas, (1914), pt.IV, p.136; Green, Land tenure in an Ibo village (1941), p.15; Bradbury, op.cit., pp.77 and 121.

2 See generally the authorities cited in footnote 1 above and footnote 1 on p.412.

latter comes of age; or when he marries under age<sup>1</sup>.

Guardian's liability to account

In theory, the guardian is bound to use the property entrusted to him for the maintenance of his ward; and, subject to his right to remuneration to be considered presently, to put the latter into full possession of whatever is left of the property when the guardianship determines in circumstances indicated above. The rule of the Benin customary law on this point has been stated by Egharevba who writes:

"he [i.e. the guardian] must take care of the property... and is entitled to his own chop-money for his pains, but he ought not to take anything more than that out of the child's own possessions. He ought to hand it over in good order...." (2)

In practice, however, the rules governing the liability of guardians to account for their dealings with the property of their wards are often disregarded, with the result that many a minor heir has grown up to find that precious little property remains out of an otherwise substantial estate that has been left to him.

In this regard, we may note the fitting remarks of

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- 1 Thomas, (1910), pt.1, pp.68, 79 and 86; Thomas, (1914), pt.IV, pp.134-5; Meek, op.cit., p.322; Egharevba, op.cit., p.40; Okojie, loc.cit.; Chubb, loc.cit.; Rowling, loc.cit.
  - 2 Egharevba, Benin law and custom (1949), pp.39-40.

Thomas, author of several works on the customs of the vast majority of the peoples of the Mid-Western Region, when he writes:

In point of fact, it by no means follows that the guardian carries out his duties, and cases have been quoted ... in which children who were small at the time of their father's death have lost all their property". (1)

It may be added that the passage quoted above instantly recalls to the mind the familiar story of the wicked uncle who has used a minor's inheritance "for the benefit of himself...."<sup>2</sup>

Misappropriation by the guardian: how the minor heir may seek redress

A minor heir whose property has been wasted or misappropriated by his guardian may seek redress in one or more of the following ways, that is to say:

- (a) bringing the matter before the elders of the family and, ultimately, before the local ruler;
- (b) relying on the supernatural intervention of the departed ancestors; and
- (c) instituting an action in a court of law.

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1 Thomas, Anthropological report on the Edo-speaking peoples (1910), pt.1, p.68.

2 See: Lloyd, "Some notes on the Yoruba rules of succession" [1959] J.A.L.7 at p.14; Lloyd, Yoruba land law (1962) p.285.

- (a) Bringing the matter before the elders of the family and, ultimately, before the local ruler.

The minor heir may report the waste or misappropriation of his property by his guardian to the elders of the family, who then enquire into the matter; and order the latter to make good the loss, if any, caused to the heir by the wrongful act complained of<sup>1</sup>. An appeal lies from the decision of the family elders to the local ruler<sup>2</sup>.

- (b) Relying on the supernatural intervention of the departed ancestors

Rather than leave the issue of his guardian's misappropriation to the decision of mortals - the elders of the family or the local ruler - who may be partial, and who are certainly fallible, the heir may choose to rely on the supernatural intervention of the departed ancestors; who are believed to be impartial in the exercise of their powers of visiting, as we have seen, acts of injustice, cheating and fraudulent dealings with sickness, other catastrophes and, indeed, death. Under the traditional system, the defaulting guardian might be made to prove his innocence or fidelity before the ancestral shrine<sup>3</sup>. This

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1 Thomas, Anthropological report on Ibo-speaking peoples (1914), pt.IV, pp.134-5; Meek, Law and authority in a Nigerian tribe (1937), pp.117, 124 and 230; Egharevba, Benin law and custom (1949), p.40.

2 Egharevba, loc.cit; cf. Thomas, (1914), pt.IV, p.135.

3 Thomas, (1914), pt.IV, p.135; Meek, op.cit., p.230.

method is, however, no longer enforceable in view of the provisions of the Criminal Code which make it an offence to participate in or preside at the ceremony of oath taking<sup>1</sup>. Nevertheless, among the believers in the cult of ancestors, the fear of the watchful eyes of the dead constitutes a most powerful influence which restrains acts of misappropriation on the part of the guardians; and ensures that the property of a minor is preserved during his minority. Thus, an author on the customs of the Mid-Western Ibo observes:

"If the guardian embezzles, the family of the heir's mother and his own umunna [i.e. the paternal family of the heir, to which the guardian also belongs] will warn him. It is believed that the ofo [sacred stick and symbol of the cult of ancestors] of the heir's father will kill him, if he goes too far in this direction." (2)

Similarly, Okojie states the position among the Ishan as follows:

"The ever constant fear of the swiftness of action of the departed ancestors over injustice and cheating made the inheritor, [i.e. the guardian] particularly honest and so turned over the non-perishable property ... when the heir grew up; in other words, he held the property in trust". (3)

As already stated, however, the spread of Christianity and other religions, such as Islam, has considerably

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1 Laws of the Western Region of Nigeria, 1959, cap.28, ss.145-8.

2 Thomas, (1914), pt.IV, p.135.

3 Okojie, Ishan native laws and customs (1960), p.91.

weakened the belief in, and the influence of, the cult of ancestors. Today, therefore, a legal action is the most effective means of checking the excesses of a fraudulent guardian. This means of redress open to the aggrieved ward is discussed under the next heading, instituting an action in a court of law.

(c) Instituting an action in a court of law

There is no doubt that an action will lie against a fraudulent guardian at the instance of his aggrieved ward. It will have been noticed in chapter one - dealing with the legal system of the Mid-Western Region - that the appropriate forum for bringing such an action is the customary court. It may, however, be noted that though they have exclusive original jurisdiction in causes and matters relating to intestate succession governed by customary law, customary courts are often reluctant to entertain these suits on the ground that they are essentially disputes to be settled amicably by members of the family. As a learned writer states it:

"... they advise the parties to go home and to return only when they have reached a settlement which, since it will (in the circumstances) almost certainly follow customary law, the courts will sanction as their own decisions".(1)

The only reported case involving a minor and his

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1 Lloyd, [1959] J.A.L.7 at p.14; Lloyd, Yoruba land law (1962), loc.cit.; cf. Lloyd, "Family property among the Yoruba" [1959] J.A.L. 105 at p.110.

guardian seems to be the Yoruba one of Martins v. Martins<sup>1</sup>. There, the minor who inherited a sum of money from his father lived with his uncle and guardian, the defendant in this action. The sum inherited by the minor had been deposited in a bank. The defendant, however, obtained an order of court authorising him to withdraw this sum for the express purpose of investing it in land on behalf of his ward. No land was ever bought; whereupon the minor, on coming of age, brought this action for the recovery of the sum. The defence was that it had been spent with the consent of the ward and for his benefit; the defendant tendering receipts to the court as to how the amount had been expended.

Counsel for the plaintiff, the ward, contended that the defendant was accountable for the whole sum totalling £196.8s.5d. Butler Lloyd, J., however, held that, despite the impropriety on the part of the defendant in withdrawing the money for one purpose and spending it for another - school fees and maintenance of the plaintiff - he should be given credit for the amount spent on the maintenance of the plaintiff; provided that the amount alleged spent was strictly scrutinised. In the result, he was held

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1 (1940) 15 N.L.R.126.



liable to pay to the plaintiff a paltry balance of £58.4s.3d.

### Rights of the guardian

In return for the discharge of his duties outlined above, the guardian is entitled to remuneration. Thus, Egharevba states the Benin customary law on the point in this way:

"He is entitled to his own chop-money [ i.e. subsistence allowance] for his pains....." (1)

Where the minor's property consists of land, the guardian may be rewarded by being allowed the use of such land during his term of office; which terminates, as has been indicated, when the ward comes of age or marries. Writing on the native laws and customs of Egbaland (part of Yorubaland) Partridge makes the following points concerning the rights of the guardian:

"The guardian is allowed, in return for his care of, and providing for, the ward, the use of, and the fruits accruing from, his ward's land during the term of his guardianship." (2)

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1 Egharevba, Benin law and custom (1949) p.39.

2 Partridge, C., "Native law and custom in Egbaland" (1911) 10 J.A.S.422, at p.424; cf. Ajisafe, The laws and customs of the Yoruba people (1924) p.4.

PART FIVE

TESTATE SUCCESSION

CHAPTER THIRTEEN

TESTATE SUCCESSION UNDER CUSTOMARY LAW

Concerning the rules relating to testate succession under Yoruba customary law, Lloyd writes:

"The distinction between testacy and intestacy by English law is almost meaningless in Yoruba customary law. The tacit will of the Yoruba man has always been that his property shall be shared .... according to rules known to.. all men". (1)

This statement is equally true of other peoples of southern Nigeria generally<sup>2</sup>; and, indeed, a learned author has urged that there is, accordingly, no need to consider testate succession under customary law<sup>3</sup>.

It should, however, be pointed out that Lloyd's statement of the Yoruba customary law quoted above is not intended to convey the idea that wills are unknown under this system of customary law. For, he also states that he has encountered "few wills" in his investigation of the rules of the Yoruba customary law<sup>4</sup>. The author's observation is merely

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1 Lloyd, "Some notes on the Yoruba rules of succession" 1959 J.A.L.7, at pp.17-18; Lloyd, Yoruba land law (1962) p.290.

2 See for instance: Meek, Land tenure and land administration in Nigeria (1957) p.182; Elias, Groundwork of Nigerian

designed to emphasise that while testate succession is the rule under English law; it is the reverse under Yoruba customary law. Similarly, another learned author makes the point when he says:

"We have tended perhaps in modern times to regard succession under a will as normal or natural and intestate succession as exceptional or accidental.... While on the other hand, distribution of property on an intestate's death has been regarded in English law as complementary to testamentary dispositions, that is to say, as taking effect in the absence of and subject to any intentions manifested by a testator in his will. In early communities, however, a will was something very different..... it was an abnormal occurrence....." 5

Notwithstanding the view expressed by a learned author to the effect that testate succession under customary law need not be considered<sup>3</sup>, it is proposed to deal with the topic for the following reasons. As will be shown later, testate succession under customary law is not confined to wills, i.e. dispositions that speak from death; but covers gifts inter vivos and donationes mortis causa or even the designation of the heir. As regards wills, it has never been doubted that those of them complying with the requirements of the customary law are clearly recognised. The

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2 .... law (1953), p.337; Elias, Nigerian land law and custom, 3rd edn. (1962) p.228.

3 Elias, (1953), loc.cit.; Elias (1962), loc.cit.

4 Lloyd, [1959] J.A.L.7, at p.18; Lloyd, Yoruba land law, p.291.

5 Parry, The law of succession, 4th edn., 1961, pp.2-3.

"few wills" encountered by Lloyd have already been mentioned. And, specifying some of the instances in which a man may make a customary will, the author says:

"The few wills I have encountered have been made either to clarify the wishes of the testator in distributing his property customarily, or to ensure that his children by concubines shall receive a fair share of the estate". (1)

Witness also the dictum of Crane Ag. J. in the recent Yoruba case of Ajoke v. Olateju<sup>2</sup>, where the learned Judge observed:

"Death-bed declarations are not unknown to native customary law, and the courts do in fact recognise them." (3)

Again, whatever might have been the position in the traditional society, it is now widely accepted that the general enlightenment of the people at the present day<sup>4</sup>, coupled with the shift of emphasis from the agnatic or extended family of old to the immediate family - the spouses and their children - is conducive to the desire to make wills, either under the customary law or general law.

Furthermore, despite the earlier emergence of intestate succession, it is generally believed that the practice followed by testators in their will-making has had some

1 Lloyd, [1959] J.A.L.7, at p.18; Lloyd, Yoruba land law, p.291.

2 [1962] L.L.R.137.

3 Ibid, at p.139.

4 Meek, op.cit., p.184; Elias, Nigerian land law and custom (1962), p.266.

influence on the customary law rules relating to intestacy.

As an eminent writer puts it:

"The fact that men usually ask that their property shall be distributed in a certain way helps to create a rule that it should descend in that way in the absence of provision to the contrary". (1)

Powers of the propositus to affect succession to his estate

The normal rules of intestate succession already discussed may be varied by the deceased himself in one or more of the following ways, viz: by -

- (1) gifts inter vivos;
- (2) nuncupative or oral wills; and
- (3) donatio mortis causa.

It will be seen later that of the three ways enumerated, only the nuncupative will, strictly speaking, refers solely to the testamentary powers of the deceased. Gifts fall within the powers of the deceased to influence the normal course of succession to his estate by disposition inter vivos; while the donatio mortis causa has been described as "a singular form of gift.... of an amphibious nature... neither a complete disposition inter vivos nor a testamentary gift". (2)

The deceased, thus, has - in addition to his testamentary powers which refer solely to dispositions which speak from death - powers of dispositions, such as those relating to

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1 Diamond, A.S., Primitive law (1935), p.248.

2 Re Beaumont [1902] 1 Ch.889, at p.892, per Buckley, J.

gifts and the designation of his heirs, by means of which he may vary the normal course of succession to his property. The term "dispositive succession"<sup>1</sup> has been used in designating these latter powers of the deceased in contradistinction to his powers with regard to testamentary succession.

Role of both types of succession (dispositive and testamentary)

When a man dies, his property is usually distributed among his children and members of his extended family. But he may not wish his normal heirs to inherit his property, as when he was on bad terms with his family during his lifetime<sup>2</sup>. Or he may be anxious to leave specific property to someone else - his child or wife, or even a complete stranger. Several reasons may be responsible for the action of a man wishing to make a departure from the normal course of succession to his estate; but it is probably true that reasons of this kind gave rise to the practice of making gifts inter vivos, nuncupative wills and donationes mortis causa.

One or two of such reasons may be mentioned. A man may give property to a relative, wife or friend as a reward for the care and attention he received from such a person during his lifetime<sup>3</sup>, especially during the fatal illness. He

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1 The writer first heard this term used by Professor A.N. Allott in October, 1958, during the course of LL.M. seminars on African Law he (the writer) attended.

2 Chubb, Ibo land tenure (1961), para.39.

3 Green, Land tenure in an Ibo village (1941), p.27.

may also leave property to any of his children or wives for whom he had special love; or he may make adequate provision for any or all of them in order to avoid the harsh consequences of the rules governing distribution, under which these persons may be excluded from the inheritance<sup>1</sup>. Finally, a man may distrust his heirs and may be anxious to prevent injustice and disputes in connection with the division of his estate; and so lay down, as his last will and testament, the precise manner in which the distribution should be made<sup>2</sup>.

Ways in which the deceased may affect the normal course of succession to his estate.

(1) Gifts inter vivos

A man may make a gift of some of his property to someone else, usually a relative or very intimate friend. Such a gift may be outright; or it may be conditional, depending on the manifest intention of the donor.

The distinction between the two kinds of gift is fairly obvious. In one, the donee is entitled to an immediate interest in possession in respect of the subject-matter of the gift; in the other, the donee's interest may be either subject to its being divested on the breach

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- 1 Diamond, loc.cit; Chubb, Ibo land tenure, 2nd edn.(1961), para. 102; Forde, D., Yakò studies (1964) p.108.
  - 2 Diamond, loc.cit; Meek, Law and authority in a Nigerian tribe (1937), p.322; Meek, Land tenure and land administration in Nigeria... p.184; Lloyd, [1959] J.A.L.7 at p.18; Lloyd, Yoruba land law, p.291; Egharevba, Benin law and custom (1949), p.39.

of the condition (by the donee) upon which the gift was made; or the actual vesting of the subject-matter of the gift may be made subject to the fulfilment of a condition precedent on the part of the donee. Thus, if a gift was made on the condition that the donee should observe special conduct of behaviour towards the donor, the interest of the former vests immediately in possession; but it is liable to be divested when he ceases to behave as stipulated, and the donor revokes the gift. As regards a conditional gift where the condition is the performance of a prior obligation, an example may be given of a gift of a portion of land to a donee on the condition that he built upon it. If he complied with the condition by erecting a building on such portion of land, his interest vested and became absolute; if he failed to build as stipulated, the gift would not take effect.<sup>1</sup>

#### Proof of gifts *inter vivos*

Meek states that a gift *inter vivos* must be made "in front of disinterested witnesses"<sup>2</sup>. This statement would seem to suggest that it is a customary law rule governing gifts that the transaction must not only be witnessed; but also that the witnesses to the transaction must be dis-

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1 Cf. Alake v. Halid and anor. (1935) 12 N.L.R.22; where, however, such a gift was made by a will in English form.

2 Meek, Land tenure and land administration in Nigeria p.182.



interested ones. With the greatest respect, this view does not accord with the customary law rule on the point. It is, of course, admitted that the absence of written evidence of transactions under customary law is generally provided for by the presence of witnesses<sup>1</sup>. But this is not to say that an otherwise valid gift is rendered void and unenforceable by reason only that it was not made "in front of witnesses" - a matter which is relevant only to proof and not to the constitution of the gift. The requirement as to the "disinterestedness" of the witnesses sounds, with due respect, unconvincing. It is most unlikely for a man to make a gift of his property without ensuring that there are present some members, especially the elders, of the family<sup>2</sup>. Now, these persons are obviously interested in the making of the gift. For, if no gifts were made by the donor, all his property would fall into the hands of members of his family at his death, and would be available for distribution among them. It is submitted that provided, as will appear later, that the donor had full control of his mental faculties and had his own private or individually-

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- 1 Elias, Nigerian land law and custom pp.184 and 186; Coker, Family property among the Yorubas, p.69.
  - 2 Thomas, Anthropological report on the Edo-speaking peoples (1910), pt.1, p.67; Thomas, Anthropological report on Ibo-speaking peoples (1914), pt.IV, pp.131-2; Omoneukanrin, Itsekiri law and custom (1942), p.73; Okojie, Ishan native laws and customs (1960), p.90.

owned property, the issue as to whether or not he made a gift of some or all of his property is a question of fact. Thus, in Alake and anor. v. Awawu<sup>1</sup>, where the point for decision was whether the deceased mother of the parties had made a gift of one parcel of her land to the defendant, the Court treated the issue as one of fact; and found for the defendant. Kingdon, C.J., delivering the judgement of the court, observed:

"...As regards the ... property the appellants contended that the finding of the learned trial Judge that the parties' mother .... did in fact give the property during her lifetime to the defendant is wrong .... it is pure question of fact". (2)

#### Essential elements of a valid gift inter vivos

On the essential elements of a valid gift inter vivos, Meek was on firmer ground when he says:

"As regards gifts inter vivos, it is hardly necessary to observe that gifts must be of property which can be legally given away.." (3)

It follows that a man can only give away property it is his to give. He cannot, for instance, validly make a gift of someone's property; or of his undivided and unidentifiable share in his family property, since, as we have seen, no one member has a separate and identifiable interest therein.

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1 11 N.L.R.39. See also, Malomo and ors. v. Olusola and anor. v. Osho and ors (1954) 21 N.L.R.1, and Bankole and anor. v. Tapo [1961] All N.L.R.140.

2 Ibid, at pp.39-40. Underlined for emphasis.

3 Meek, Land tenure and land administration in Nigeria (1957) p.182.

Perhaps, this is where it is advisable (it cannot be put higher so as to erect a legal rule) that there must be witnesses - especially family members and elders - to the transaction. As a writer puts it:

"The transaction should therefore be witnessed by the donor's olori ebi [i.e. the head of the family] as a certification that the donor does in fact possess the right to the gift.."1

The donor must be able to make full use of his mental facilities at the time of the gift. So, a gift made during a period of madness, or under the influence of drink or drugs, or in extreme old age imposing senility, is null and void, since the donor would not be expected to exercise his powers of reasoning properly. The gift must also be voluntary in the sense that it is an act of free volition on the part of the donor. These essential elements of a valid gift - mental state and free will of the donor - are the same as in the case of nuncupative wills, and will be discussed more fully in the section on wills.

The donee must signify his acceptance of the gift at the time it is made or so soon thereafter as he can; and must, in any case, do so in the presence of the donor. He may present a drink, some money or any article to the donor or his relatives. Such a present, however, does not form

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1 Lloyd, "Some notes on the Yoruba rules of succession" [1959] J.A.L.7, at p.17; Lloyd, Yoruba land law (1962) p.290. Cf. Loveridge, A.J., "Wills and the customary law in the Gold Coast" (1950) 2 J.A.A., No.4, 24 at p.27.

an essential element of a gift, unless it was a conditional gift made on such a condition. In this connection and by way of contrast, we may note the position under Akan customary law, under which the donee must evidence his acceptance by the gift of aseda (drink or some token sum of money) which he presents to the donor; part of which is served or shared among the witnesses to the transaction<sup>1</sup>.

Lastly, it is also an essential element of a valid gift inter vivos that the donee is put in possession of the subject-matter of the gift. In the case of movable property, the donor must effect actual delivery of the gift. As regards immovable property, such as land, however, possession is given by taking the donee to the land and round the boundaries; usually at a time when the owners of adjoining lands are present in response to prior notice given to them by the donor.

We may then summarise the essential elements of a valid gift inter vivos as follows:

- (a) the sanity of the donor;
- (b) the free will of the donor;
- (c) the disposability of the subject-matter;

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1 On this, see: Rattray, R.S., Ashanti law and constitution (1956), pp.15, 24 and 116; Danquah, J.B., Akan laws and customs (1928), pp.185 and 219; Matson, J.N., "Testate succession in Ashanti" (1953) 23 Afr. p.224.

- (d) the acceptance of the gift by the donee in the lifetime of the donor; and
- (e) the delivery of the subject-matter by the donor to the donee.

(2) Nuncupative or oral wills

A nuncupative will has been defined as "a declaration made voluntarily and orally by a person in sound mind, in expectation of death, in the presence of responsible and disinterested witnesses". (1)

The definition rightly calls attention to some of the principal characteristics of a nuncupative will, namely:

- (a) that the testator must possess sound mental capacity;
- (b) that the dispositions must be voluntary and free from undue influence, fraud or coercion; and
- (c) that it is oral.

However, this definition is inadequate in several respects, and calls for some comments. It is certainly not a rule of the customary law that a nuncupative will can only be validly made in expectation of death. It is, of course, true that a man may be reluctant to indicate the destination of his property unless and until he feels that he is approaching the end of his days. But that is an entirely different matter from saying that a testator cannot make

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1 Meek, Land tenure and land administration in Nigeria p.182.

a valid nuncupative will when he is in good health. It is submitted that it is not essential that the testator should be on the point of death, in grave sickness, or even in fear of death in the future; and that the requirement as to expectation of death is, as will be shown later, relevant only in the case of a donatio mortis causa.

Similarly, the definition is unduly restrictive in its requirement that the declaration must be made in the presence of disinterested witnesses. It will be recalled that this requirement has been adequately criticised in connection with gifts inter vivos, and the reader is referred to the section on these. It is, however, necessary to observe that it is almost certain that a man wishing to dispose of his property by a nuncupative will would ensure that the members of his family were close at hand. Meek himself admits this elsewhere, for he states:

"When a person of social importance becomes a permanent invalid, or so ill that he is likely to die, he may call the family-group together and designate his successor.....<sup>1</sup>. A case came to my notice of a rich man overriding local custom by bequeathing the family of to his eldest son when normally it should have passed to his younger brother. But the old man first secured the consent of all the members of the family including the brother..." (2)

From the practical point of view, however, it is advisable for the beneficiary under a nuncupative will to

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1 Meek, Law and authority in a Nigerian tribe, p.303.

2 Meek, ibid, pp.322-3.

ensure that there are both disinterested or independant witnesses and the family witnesses - who, obviously, are interested in the testamentary gift - when the declaration is made. Both types of witnesses serve different functions: the disinterested or independant ones help to prove the gift, they being regarded as impartial by reason of their lack of interest in the matter; the family witnesses, though interested, serve to bind the family by their consenting presence or acquiescence.

#### Essential requirements of a valid nuncupative will

The essential requirements as to the mental state of the testator and the voluntary nature of his dispositions have been noted. Other essential elements are that:

- (a) the property given away must be identifiable;
- (b) it must be disposable; and
- (c) the beneficiary must be identifiable.

Putting all the essential requirements together, the essential elements of a nuncupative will may be stated as:

- (i) testamentary intention of the testator;
- (ii) identity of the subject-matter;
- (iii) disposability of the subject-matter; and
- (iv) identity of the beneficiary.

These essential elements will now be briefly considered.

(i) Testamentary intention

One aspect of this requisite is that a person suffering from mental disorder is, during the continuance of such disorder, incapable of making a valid testamentary disposition. Infirmary or weakness caused by old age or illness may produce such mental disorder as to affect a person's testamentary capacity. Similarly, any temporary impairment of the mind resulting from accident, which deprives a person of the full use of his mental faculties, may interfere with his capacity to make a valid nuncupative will. A drunkard, therefore, cannot make a valid nuncupative will while he is drunk; nor can a person who is drugged, while still under the influence of drugs. But a will made by an insane person during a lucid interval is valid. The requirement as to this aspect of testamentary intention is similar to the position under the general law; and it is difficult to resist quoting the classic utterance made on the matter by Cockburn, C.J., in Banks v. Goodfellow<sup>1</sup>:

"It is essential ... that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object that no disorder of the mind shall poison his affections; pervert his sense of right or prevent the exercise of his natural faculties, that no insane delusion shall influence his will in disposing of his property, and bring about a

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1. L.R.5 Q.B. 549.



disposal of it which, if the mind had been sound, would not have been made." (1)

The other aspect of this essential element is that a nuncupative will is invalid if it is made through undue influence which destroys the free agency of the testator, and substitutes therefor the will of another. This will be the case where a testator was forced by the threat of death, bodily harm or the disgrace resulting from the non-performance of his funeral rites, to give his property away.

(ii) Identity of subject-matter

The property left by means of a nuncupative will must be specified either as an individual item or as one or more of a class of items, for example, a particular chair; or one or more of plots of land owned by the testator. This is because, as has been noticed, a man may not give away his entire estate; and certain specific items of his property may be reserved for his sole or principal heir.

(ii) Disposability of subject-matter

This requirement is self-evident. Nemo dat quod non habet is the statement of the English legal principle for it. A man can only give away property which it is his

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1 Ibid, at p.565.

to dispose of. His attempt, for instance, to devise his undivided and unidentifiable share in his family or communal property will be ineffective, since, as we have pointed out earlier, his interest therein is inalienable until there has been partition of such property; and, in any case, his interest therein determines at his death. This point will be illustrated more fully when we deal with testate succession under the general law in the next chapter.

(iv) Identity of beneficiary

This requirement does not normally present any difficulty; for, unless unavoidably prevented, it is usual for the beneficiary under a nuncupative will to be present when the declaration is made; and to accept the devise or bequest made to him. But it is not essential that he should be personally present at the time when the will is made; and a testator may validly give property by his will to his absent child or one en ventre sa mere. In this regard, the contrast between the beneficial interests of posthumous children under a will and the absence, generally, of their rights under the rules relating to intestacy should be noted. For, while, as we have seen, a posthumous child is not generally accorded inheritance rights in the distribution of its father's estate, it can be a beneficiary under his will.

Another factor which makes it easy to fulfil this requirement of the nuncupative will is the publicity that attends the declaration; coupled with the fact that the beneficiaries under a man's will are usually well-known - his children and other members of the family, and, sometimes, his wives. It is only rarely that a man may leave any of his property to a person who is a stranger to him by blood. As has been noted, this usually happens when the relationship between the testator and his family was strained at the time he made his will.

#### Effect of a nuncupative will

##### (a) When it takes effect

A nuncupative will takes effect on the death of the testator; and once it has been validly made, the beneficiary acquires a vested interest in the property given, subject only to a condition precedent, namely; the death of the testator. In the mean time, the testator may use the property as he pleases. A nuncupative will is thus distinguishable from an outright gift inter vivos, where, as we have seen, the donee acquires an immediate interest in possession.

##### (b) The attitude of the testator's family

It will have already been seen that neither the consent of the members of the family nor their presence at the time

of making the declaration is an essential requirement with respect to the constitution of an otherwise valid nuncupative will made by the testator. Nevertheless, their attitude to the dispositions contained in the will is important if only because it is their scrutiny which ensures that any invalid provisions therein contained are not enforced; since disputed cases of succession very often end at the family level, and without the intervention of the court.

Members of the family, especially those who have not benefited or benefited adequately under the testator's will, are naturally hostile to gifts made by their deceased member by his will. The persons most jealous of such gifts will be potential heirs, the brothers and sisters of the deceased, and other members of the extended family, in that order. Their jealousy increases as the degree of blood relationship between the testator and the beneficiary becomes less close. Hence, gifts to members of the family will occasion least scrutiny or opposition; thereafter gifts to the deceased's wives and intimate friends will not be too jealously scrutinised, unless where they are excessive or the recipients are in ill favour; while, lastly, bequests and, especially, devises to complete strangers will be most strenuously resisted. This is where the point made in connection with the advisability of the presence of some

members of the family at the time of the gift is of immense importance. By ensuring that some of their members are so present, a beneficiary thereby forestalls both the hostility and objection of the family to the gift.

(8) When the family may upset a will

A nuncupative will complying with the essential requirements discussed above may nevertheless be successfully challenged by the testator's family, on the ground that giving effect to it would be tantamount to disinheriting the person entitled under the rules relating to intestacy. This statement of the law is most vividly illustrated by the Itsekiri maxim:

" 'E ne biri omokparan te tse te gba gba oro-okun' (Be what it may the heir-at-law [i.e. the eldest son] must receive the coral-bead necklace". (1)

We have already seen that the house in which a father lived may not be left away from his eldest son; nor must he [the eldest son] be deprived of specific articles, such as, the deceased father's only gun, hat, bundle of beads, etc.

Failure of gifts

(a) Revocation

The testator may at any time before his death revoke a testamentary gift. He may do this, for instance, where

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1 Omoneukanrin, op.cit., p.74.

he is no longer on good terms with the beneficiary; as where the latter has been guilty of infamous conduct, or has been insolent to the testator or to a member of the latter's family.

(b) Ademption

Sometimes a testator may during his lifetime dispose of the whole or best part of the property he had previously allotted to a beneficiary; or the property given is destroyed during the lifetime of the testator; or he may recover a debt or part of it after he had bequeathed it to a beneficiary. When this happens, such property or part thereof, as the case may be, is adeemed. But there is no presumption of ademption, as under the general law, whereby provisions made by a father during his lifetime to his child may, in certain circumstances, operate to adeem a gift given to the child in his father's will<sup>1</sup>.

(c) Lapse

If the beneficiary dies during the lifetime of the testator, the gift to him lapses. The provisions of the general law, which save a gift from lapsing where the beneficiary predeceasing a testator leaves a surviving child, have no application under customary law.

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1 On this presumption of ademption (general law [English Law] ), see Parry, op.cit., pp.124-6.

(d) Disclaimer

A beneficiary may refuse or renounce a gift made to him by the testator. Such a disclaimer usually occurs where onerous conditions are attached to the gift; or, where, in consequence of the gift being made, the beneficiary is required or merely expected to undertake some heavy responsibilities. An instance of such responsibilities is the case where a beneficiary is required or expected to bear the whole or major part of the testator's burial and funeral expenses. Meek puts the point in this way:

"...A gift of this kind may involve responsibilities - such as a duty to bear part of the expenses of the deceased's funeral. The heir named may also be held responsible for a portion of the deceased's debts (proportionate to the amount of the bequest)". (1)

The effect of reducing a nuncupative will into writing

With the spread of literacy, the terms of the traditional oral will are sometimes reduced into writing. The idea behind such a practice may be to clarify the wishes of the testator; and to ensure that little or no room is left for disputing the fact of his having made a customary will. The effect, however, of such writing may astound the testator, since the view has been that the will is thereby taken from the realm of the customary law; and its validity in

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1 Meek, Land tenure and land administration in Nigeria.. pp.183; cf. Thomas, Anthropological report on the Edo-speaking peoples, (1910), pt.1, pp.70 ff; Talbot, The peoples of southern Nigeria (1926), vol.III, p.428; Egharevba, op.cit., p.33; Okojie, op.cit., p.92.

the sense of qualifying for admission to probate is governed by the general law relating to wills. It should, however, be observed that once such a will is successfully propounded for probate purposes, its provisions will be construed, and they take effect, in accordance with the applicable customary law. This point will be illustrated in chapter fourteen dealing with wills made in the general law (English law) form.

#### Admission of written customary wills to probate

##### (a) The Federal Territory of Lagos

The High Court of Lagos will not grant probate or letters of administration with the will attached in the case of a written customary will. It has already been observed that the jurisdiction of that Court in probate causes and matters is, generally speaking, to be exercised in conformity with the law and practice for the time being in force in England. Now, the English High Court of Justice will not admit such a will to probate. There is also the fact that the English Wills Acts<sup>1</sup> apply to Lagos as statutes of general application in force on the 1st January, 1900<sup>2</sup>; and the Court itself had decided that even a will made in

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1 (1837), 7 Will.4 and 1 Vict. c.26; and (1852), 15 Vict. c.5.

2 In the will of Wright: Lumpkin & anor. v. Souza (1929) 9 N.L.R.81, at p.82.



English form will not be admitted to probate if it fails to comply with the requirements of the general law. Thus, in Nelson and anor. v. Akofiranmi<sup>1</sup>, Bellamy, J., refused to grant probate in respect of a will made in English form on which the testator had made his mark after the attesting witnesses had signed their names. In the course of his judgement, he observed:

"It is clear to my mind that before a document can be admitted to probate it has to be a testamentary document, complying with the requirements of the Wills Acts, 1837 and 1852". (2)

Similarly, in the more recent case of the Federal Administrator-General v. Johnson and anor<sup>3</sup>, where the defendants (two of the testator's children) unsuccessfully opposed the grant of probate to the plaintiff (the executor), Coker, J., as he then was, laid down the law as follows:

"By the law of wills it is required that every will probate of which is granted should be free and voluntary expression of a capable testator and that every such will should be properly attested in accordance with the provisions of section 9 of the Wills Act." (4)

(b) The Eastern Region

It has already been seen that the original jurisdiction of the High Court of the Eastern Region is excluded "in any matter which is subject to the jurisdiction of a Native Court relating to marriage, family status, guardianship of children and inheritance or disposition of property on death."

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1 [1959] L.L.R.143.

2 Ibid, at p.145.

3 [1960] L.L.R.290.

4 Ibid, at p.293.

It has also been seen that the courts, which exercise original jurisdiction in these matters, are the customary courts. The High Court will on this ground alone refuse to exercise original jurisdiction in respect of the admission to probate of a customary will. In the case of Briggs v. Briggs<sup>1</sup>, which involved paternity and legitimacy under customary law, the High Court set aside the judgement of the magistrate's court which heard the case at first instance, on the ground that the lower court had no jurisdiction.

Quite apart from the provisions of the High Court Law on this point, the Court is, as we have seen, to exercise jurisdiction in these matters in conformity with the current English law and practice relating to the grant of probate. This, of course, means that the English Wills Acts apply, quite apart from their application by virtue of their being held as statutes of general application applying to Nigeria. Thus, in Onwudinjoh v. Onwudinjoh and ors<sup>2</sup>, Ainley, C.J., held that the will alleged made by the testator could not be admitted to probate on the ground, inter alia, that it did not comply with the requirements of section 9 of the Wills Act, 1837.

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1 (1957) II E.N.L.R.6.

2 (1957) II E.N.L.R.1.

(c) The Western and the Mid-Western Regions

Unlike the High Court of Lagos Act and the High Court Law of the Eastern Region, the High Court Law of the western Region does not have any specific provisions permitting the Court to exercise its probate jurisdiction in conformity with English law.\* But there is a general provision which would rule out the question of admitting customary wills to probate. The relevant provision reads:

"To the extent that such jurisdiction may be conferred by the Regional Legislature, the jurisdiction by this Law vested in the High Court shall include all Her Majesty's civil jurisdiction ..... for the judicial hearing and determination of matters in difference, or for the administration or control of property or persons.....(1)

It cannot be seriously argued that the jurisdiction of Her Majesty's High Court also exists for the granting of probate in respect of customary wills.

There are, however, two other reasons why the High Courts of these two Regions will not admit written customary wills to probate. Firstly, it has been noted that these Courts have no original jurisdiction in causes and matters relating to customary succession, where these are subject to the jurisdiction of a customary court. Secondly, we have seen that the Administration of Estates Law, which applies in probate matters, contains an express provision excluding

1 The High Court Law of the Western Region, Laws of the Western Region, 1959, cap.44, s. 9(1).

\* The Court is, however, to follow English procedure and practice in probate matters. See: The High Court Law (Western Region), cap.44, ss. 9 and 11.

cases where the succession is governed by customary law.

The position of a written customary will in a customary court

The question here raised is: suppose, instead of being propounded in the High Court, a written customary will is produced before a customary court, has the latter court power to deal with it in a manner approximating to the way in which the High Court grants probate in respect of wills in English form? The answer to this question depends entirely on the provisions of the law establishing these customary courts, and the jurisdiction conferred upon them by that law. As regards the Federal Territory of Lagos, this question does not arise, since it has been observed that there are no such courts in the Federal Territory. For the position in the rest of southern Nigeria, the relevant provisions of the Customary Courts Laws will fall to be examined.

(a) The Western and the Mid-Western Regions

The customary courts of both the Western and the Mid-Western Regions have no power to admit a written customary will in proceedings before them, because their jurisdiction in succession matters is limited to "causes and matters relating to inheritance upon intestacy and the administration of intestate estates under customary law"<sup>1</sup>.

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1 The Customary Courts (Amendment) Law, W.R. No.34 of 1959, amending the Second Schedule to the Customary Courts Law, cap.31, ibid.

Matters relating to customary wills deal with testacy, and therefore fall outside the jurisdiction of these courts.

(b) The Eastern Region

The position of the customary courts of the Eastern Region is different, and a written customary will complying with the essential requirements of the customary law already considered will be admitted in these courts as the last will and testament of the testator. This view, which is also held by a writer on Ibo law<sup>1</sup>, is supported by a provision of the Customary Courts Law<sup>2</sup>, which confers jurisdiction on the courts in respect of succession under customary law, whether testate or intestate. The relevant provision reads, in part:

"Causes and matters relating to succession to property and administration of estates under customary law...." (3)

(3) Donatio mortis causa

We have already briefly touched upon the amphibious nature of a donatio mortis causa. It falls half-way between a nuncupative will and a gift inter vivos; and possesses some of the characteristics of these two ways by means of which the deceased may affect the course of succession to his estate.

A donatio mortis causa is like a nuncupative will

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1 Obi, The Ibo law of property (1963) p.211.

2 No.21 of 1956.

3 Ibid, First Schedule thereto, para. 2(iii).

in the sense that it takes effect, and is conditional, on the death of the donor. But, whereas it is not an essential requirement of a nuncupative will that the beneficiary under it must be given possession of the devise or bequest, it is essential in the case of a donatio mortis causa that the donee should be put in possession of the subject-matter of the gift. In this requirement (that the donee should have possession of the property given), it resembles the gift inter vivos; but, unlike the latter, the interest of the donee in the case of a donatio does not vest in possession until the death of the donor.

A donatio mortis causa is more likely to be made in time of illness, when the donor is on his death-bed, and when he hurriedly sends for the donee and members of the family. But it must be pointed out that it is not essential that the donor should be on the point of death, in grave sickness, or even in fear of death in the near future. Other likely times for the making of donationes are during periods of stress, or when the donor is about to engage in a risky undertaking. As an example of the first, the writer would recall his experience during the Second World War when several young soldiers, hailing from his district, made gifts of their property, conditional on their death in war. As regards the second, the writer has personally witnessed instances of persons making donationes just before going

for major operations in the hospitals.

For the essential requirements of the donatio mortis causa, the reader is referred to what has been discussed in connection with the essential elements of both the nuncupative will and the gift inter vivos. But, perhaps, it is pertinent to quote one of the best statements of the law in this regard, namely, the classic utterance of Lord Russell of Killowen in Cain v. Moon<sup>1</sup>:

"For an effectual donatio mortis causa, three things must combine: first, the gift or donation must have been in contemplation, though not necessarily in expectation of death; secondly, there must have been delivery to the donee of the subject-matter of the gift; and thirdly, the gift must be made in such circumstances as to show that the thing is to revert to the donor in case he should recover". (2)

#### Limitations on the powers of the deceased to effect dispositions of his property

If the testamentary dispositions and gifts inter vivos made by the deceased are to take effect, they must not offend certain rules of the customary law. Otherwise, they are liable to be upset at the instance of the members of the family, especially those who would take in default of such dispositions and gifts<sup>3</sup>. In point of fact, however, the family are reluctant to override the wishes of the deceased;

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1 [1896] 2 Q.B.283.

2 Ibid, at p.286.

3 Meek, Land tenure and land administration in Nigeria ..., p.183; Okojie, op.cit., p.93. Rowling, Land tenure in Benin Province, para. 23; Bradbury, The Benin kingdom, p.47.

and will nearly always endeavour to carry them out, out of fear of the spirit of the departed man or of respect for his memory<sup>1</sup>.

The customary rules limiting the deceased's powers of disposition may be stated as those relating to:

- (1) nature of property involved; and
- (2) disherison.

It will be noted later that both rules have much in common, in being designed so as to prevent a man from practising generosity at the expense of his heirs. But they (the rules) are also different: for whereas total disherison deprives an heir of all rights in respect of the estate; the leaving away from him of property which is by law to descend to him, which may threaten his inheritance rights, need not necessarily amount to disherison, since he may be otherwise provided for by the deceased. We shall now examine these rules a little further.

#### (1) Nature of property involved

The discretionary powers of the deceased to make testamentary dispositions and gifts inter vivos of his property are generally restricted with respect to certain items of his property, which must descend to his sole or

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1 Meek, loc.cit; Ward Price, Land tenure in the Yoruba Provinces, para. 46; Omoneukanrin, Itsekiri law and custom, p.73.



principal heir. Such an heir, we may recall, is usually the eldest surviving son. The more usual forms of property to which the restriction applies are the deceased's dwelling-house, and one (at least) of his plantations. Rowling states the position among the Bini as follows:

"A man has complete discretion to divide plantations among his wives and children or to devise them by will; but must leave at least one to the heir. The same rule covers house-property .... the deceased's only house in which he lived must go to the eldest son". (1)

This restriction of the deceased's powers is by no means limited to cases where the property involved is immovable, such as a house; or where the property "savours of realty"<sup>2</sup>, such as a plantation; but extends to movables like beads<sup>3</sup>. In fact, informants say that the restriction covers items of movable property such as guns, hats, walking-sticks, etc., at least one of which must be reserved for the sole or principal heir<sup>4</sup>. Among the Ivbiosakon, however, the eldest surviving son is entitled to all the articles of dress or adornment which were personally in use as everyday wear by the deceased at the time of death; notwithstanding the latter's attempt to give them away to someone else<sup>5</sup>.

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1 Meek, loc.cit; Ward Price, Land tenure in the Yoruba Provinces, para. 46; Omoneukanrin, Itsekiri law and custom p.73.

2 Etim and ors. v. Eke and ors. v. Ekpri and ors. (1941) 16 N.L.R.43 at p.51; per Martindale, J.,

3 Omoneukanrin, op.cit., p.74.

4 The writer's informants were: the Oba of Benin, the Ovie of Ughelli and Chief T.E.A. Salubi (Urhobo); Chief Akiri (Isoko); Chiefs N.K. Probeni and L.A. Aborosan (Ijaw); and Chief H.H.A. Esechie (Ivbiosakon).

5 Information personally obtained from Chief H.H.A.Esechie (Ivbiosakon).

The reason for the rule restricting the discretionary powers of the deceased with respect to the disposition of the items of property concerned is two-fold: to enable the heir to step into the deceased's shoes; and to make it easier for him to establish his authority over, and assume his obligations towards, those for whom the dead man was responsible<sup>1</sup>.

(2) Disherison

It will have been noticed that, in general, it is well-nigh impossible for the deceased totally to disinherit his sole or principal heir, since the latter may always count on taking those items of property which are reserved for him by customary law as indicated above. As regards the subsidiary heirs, however, the position is different; and it is generally recognised that they may be completely disinherited<sup>2</sup>. But the Benin customary law rule differs on this point in that a man may not totally disinherit any of his heirs without the prior consent of his family<sup>3</sup>; or, ultimately, of the Oba<sup>4</sup>.

In practice, cases of disherison are rare. They are

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- 1 Omoneukanrin, Itsekiri law and custom (1942) p.74; also the informants mentioned in footnotes 4 and 5 in the preceding page.
  - 2 Okojie, Ishan native laws and customs (1960) p.92; also the informants referred to in footnotes 4 and 5 in the preceding page.
  - 3 Bradbury, loc.cit.
  - 4 Rowling, loc.cit. Confirmed by the Oba himself.

usually the result of ill-feelings between the deceased and his heirs; and, no doubt, because of their rarity, declarations containing disherison are often made in solemn form. Thus, among the Ishan, a father disinheriting his child slaughters a goat at the ancestral shrine, where also he solemnly announces his intention to disown the child with effect from the date of such declaration<sup>1</sup>.

However, the family of the deceased may scrutinise the reason for the disinheritance of an heir; and, unless it is justified by law on account of the heir's fault, the deceased's wishes may be ignored in the distribution of the estate. If, however, the family are satisfied that the heir has been disinherited for good cause, they uphold the wishes of the dead man. Thus, where a child has caused his parent great distress and financial loss, the latter will be justified in disinheriting such a child<sup>2</sup>.

It should be borne in mind that a disinherited child may be reinstated and given property by the parent, if the cause of the disherison has ceased; for example, where a reconciliation has been effected between parent and child<sup>3</sup>.

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1 Okojie, loc.cit.

2 Okojie, loc.cit.; Lloyd, "Some notes on the Yoruba rules of succession", [1959] J.A.L.7, at p.18; Lloyd, Yoruba land law (1962), pp.290 and 291.

3 Okojie, loc.cit.

## CHAPTER FOURTEEN

### TESTATE SUCCESSION UNDER THE GENERAL OR WILLS IN ENGLISH FORM

Unlike the position in some African countries which have had the British colonial connection<sup>1</sup>, it has never been doubted that the Africans of Nigeria have the power to make wills in English form<sup>2</sup>. Thus, the contention of counsel in Apatira and anor. v. Akanke and ors.<sup>3</sup>, to the effect that the validity of a will made apparently in English form by a Nigerian Moslem should be governed by Moslem law, was flatly rejected by Ames J., who retorted: "The fact that the deceased was a Nigerian and a Mohammedan cannot make any difference to the necessity of complying with the requirements of the Wills Acts." (4)

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- 1 Kenya and Uganda, for example, for which see respectively: The future of law in Africa, p.44 - Record of proceedings of the London conference, 28th December, 1959 to 8th January, 1960, edited by Professor Allott; Morris, H.F., "The law of succession in Uganda", pp.3 and 9 - Paper prepared for, and presented at, the Ibadan conference on the integration of customary and modern legal systems; 24th to 29th August, 1964. The present writer also gathers from Professor Allott that Africans in Malawi (Nyasaland) and Zambia (Northern Rhodesia) have no power to make wills in English form.
  - 2 See, for instance: In the Will of Wright: Lumpkin and anor. v. De Souza and ors. (1929) 9 N.L.R.81; Lawal and ors. v. Younan and ors. [1961] All N.L.R.245; [1961] W.N.L.R.197.
  - 3 (1944) 17 N.L.R.149.
  - 4 Ibid., at p.151.

The reception of the Wills Acts in southern Nigeria

The introduction of English law into Nigeria, as a whole,<sup>1</sup> has been effected by a local statute - the former Supreme Court Ordinance<sup>2</sup>. As regards the Federal Territory of Lagos and the Eastern Region, the provisions receiving English law are now contained, as has been seen, in the Law (Miscellaneous Provisions) Act<sup>3</sup> of Lagos; and the High Court Law<sup>4</sup> and the Magistrates' Courts Law<sup>5</sup> of the Eastern Region<sup>6</sup>. Concerning the position in both the Western and the Mid-Western Regions, however, it will be recalled that the Wills Law<sup>7</sup>, a local statute based substantially on the relevant English law, is in force. We may now briefly consider the law relating to wills as it stands in the Federal Territory and the Eastern Region, on the one hand; and in the Western and the Mid-Western Regions on the other.

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- 1 As a whole, because prior to the enactment of legislation having effect throughout the country, there were in force separate Ordinances in different parts of Nigeria. See, for instance: No.3 of 1863 applicable to Lagos Colony only; No.4 of 1876 applicable to the Gold Coast Colony of which Lagos formed part; No.4 of 1900 (Proclamation) which applied to the Protectorate of Northern Nigeria; and No.17 of 1906 which was in force in Lagos Colony and the Protectorate of Southern Nigeria.
  - 2 (1914), cap.3, s.14, Laws of Nigeria, 1923 edn.
  - 3 The unrepealed part of cap.89, s.45, Laws of the Federation of Nigeria and Lagos (1958).
  - 4 No.27 of 1955, s.14.
  - 5 No.10 of 1955, s.40.
  - 6 For a discussion of the relevant provisions of the enactments referred to in footnotes 3 to 5 above, see chapters 3 and 4, at pp.70-72 and 108-9.
  - 7 Cap.133, Laws of the Western Region of Nigeria, 1959.

(1) The Federal Territory of Lagos and the Eastern Region

On the basis of their applicability as statutes of general application, the English enactments relating to wills in force in Lagos and the Eastern Region are the Wills Act of 1837<sup>1</sup> and the Wills Act Amendment Act of 1852<sup>2</sup>. This is because, as has been pointed out, the provisions receiving English law<sup>3</sup> into both jurisdictions have expressly specified the 1st January, 1900, as the date of reception. On this basis, therefore, the later English statutes on the subject,

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1 7 Will.4 & 1 Vict., c.26.

2 15 & 16 Vict., c.24.

3 For the controversy as to whether the reference date (1900) applies also to English common law and doctrines of equity; or whether it is limited to statutes only, see: Allott, Essays in African law, p.31, where the author is of the view that the reference date applies to all three sources of law; Park, The sources of Nigerian law, pp.20-24, where this author takes a contrary view; and states that it is the current common law and doctrines of equity of England, which are in force in Nigeria. See also, Nwabueze, The machinery of justice in Nigeria (1963) pp.21-22, where the author holds yet a different view, namely, that the common law the Nigerian courts are required to apply is not just English common law, but it includes the common law of other common law countries. As Professor Allott has rightly pointed out, if the current English law were already applicable by virtue of these provisions, there would have been no need for the special provisions of the High Court enactments empowering the Courts to apply current English law. Further support may be found for this view in the provisions of the Western Regional enactment, Law of England (Application) Law, cap.60; section 3 of which specifically provides that the current common law of England and the doctrine of equity shall be in force in the Region, subject to the provisions of any local law to the contrary.

such as the Wills (Soldiers and Sailors) Act of 1918<sup>1</sup> and the Navy and Marines (Wills) Act of 1953<sup>2</sup>, are clearly inapplicable.

However, attention must again be drawn to the provisions of both the High Court of Lagos Act<sup>3</sup> and the High Court Law<sup>4</sup> of the Eastern Region, which empower the Courts to exercise probate jurisdiction in conformity with current English law and practice. This means that in deciding whether to admit a will to probate, these High Courts may apply the provisions of these later English Acts governing privileged wills; on the ground that this is in conformity with current English law and practice.

## (2) The Western and the Mid-Western Regions

The law of wills in force in both the Western and the Mid-Western Regions is a local statute - the Wills Law<sup>5</sup>. And, like the Administration of Estates Law<sup>6</sup> applicable in both Regions, the Wills Law<sup>5</sup> is almost entirely a reproduction of the English enactments on the subject, namely: The Wills Act<sup>7</sup>; The Wills Act Amendment Act<sup>8</sup>; and the Wills (Soldiers and Sailors) Act<sup>1</sup>. The Navy and Marines (Wills) Act<sup>2</sup> is not, however, incorporated in the Wills Law.

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1 7 & 8 Geo.5, c.58.

2 1 & 2 Eliz.2, c.24.

3 Cap.80, s.16, Laws of the Federation of Nigeria and Lagos, 1958.

4 No.27 of 1955, s.16.

5 Cap.133, Laws of the Western Region of Nigeria, 1959.

6 Cap.1, ibid.

7 7 Will.4 & 1 Vict., c.26.

8 15 & 16 Vict., c.24.

It must not, however, be assumed, as in the case of Lagos and the Eastern Region, that the Navy and Marines (Wills) Act<sup>1</sup> may still apply in the Western and Mid-Western Regions, by virtue of the provisions embodied in the High Court enactment regarding the exercise of the probate jurisdiction of the Court. For, as has been observed, the probate jurisdiction of the High Courts of the Western and the Mid-Western Regions is to conform to that of the English High Court as regards practice and procedure only; and not as regards substantive law<sup>2</sup>. One result of this is that there exist no provisions in both Regions empowering a seaman or marine to make a privileged will.

The provisions of the Wills Law recognising some rules of customary law

The Wills Law<sup>3</sup> contains two provisions designed to take account of the rules of the customary law. The rules so recognised are those relating to

- (a) the indisposability of certain forms of property; and
- (b) the effect of a marriage on a will.

(a) The indisposability of certain forms of property

It has already been mentioned in the chapters on

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1 1 & 2 Eliz.2, c.24.

2 The High Court Law, Western Region, cap.44, ss.9 and 11, Ibid.

3 Cap.133, Laws of the Western Region of Nigeria, 1959.



distribution and on customary wills that certain items of the property of the deceased must descend to the heir; notwithstanding any attempt on the part of the former to leave them to other persons by his will. Similarly, it has been noted that the deceased has no power to make a will of his share in his family property, on the ground that he has no separate and identifiable interest in such property. The provisions of the Wills Law have given recognition to these rules of the customary law. Thus, while section 3 (1) of the Law gives powers to every normal person to "devise, bequeath or dispose of, by his will ... all real and personal estate which he shall be entitled to..."; it nevertheless adds a provision that the exercise of such testamentary powers must be "subject to any customary law relating thereto....".

(b) The effect of a customary marriage on a will

Although customary law seems to be silent on the effect of a marriage on a will made before the contracting of a marriage, yet the view may be expressed that a marriage does not and ought not to have the effect of revoking a will under customary law. Indeed, were the rule otherwise, its operation would lead to absurd results, having regard to the polygynous nature and, hence, the frequency of customary unions.

The non-existence of a rule of the customary law, which operates to revoke a testator's will on his marriage subsequent to the making of the will, is recognised by a section of the Wills Law. It provides:

"Every will made by a man or woman shall be revoked by his or her marriage (other than a marriage in accordance with customary law)".(1)

The position of gifts to wife or husband of attesting witness

The Wills Law contains a provision which renders null and void gifts made by a testator to the wife or husband of any person attesting the will<sup>2</sup>. Neither in the Law itself nor in the Interpretation Law<sup>3</sup> are there any definitions of the words "husband" and "wife"; and it is not clear whether the legislature intended that these words should include spouses of a customary marriage. In view, however, of the contrast between this section<sup>2</sup> - which is silent on the position of customary spouses - and section 15 - which expressly excludes a customary marriage from the form of marriage that may revoke a will - it is submitted that a gift made to a customary spouse under a will whereof the other spouse was the attesting witness will be void. It is suggested that this section of the Law requires clarification by the legislature.

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1 Cap.133, s.15, ibid.

2 Op.cit., s.12.

3 Cap.51, op.cit.

The requirements of a valid will under the general lawScope

It is not proposed to go into any formal or detailed discussion of the English law of wills in force in southern Nigeria, either as statutes of general application or as embodied in a local enactment; nor of the requirements prescribed by English law regarding the making of wills, such as testamentary capacity, due execution and testamentary character of the instrument. The principles and rules of English law governing these matters have been lucidly treated by the acknowledged masters in this field, whose standard works on the subject are readily accessible for reference<sup>1</sup>.

The discussion which follows is, accordingly, concerned almost exclusively with two main topics and a subsidiary one, namely: the distinction between the validity of a will and that of the dispositions contained therein; the purposes for which the new-found machinery, offered by the English law of wills, has been employed by the Nigerian testator; and the problems of construction that have arisen where, as Butler Lloyd, J., so aptly puts it,

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1 See Williams, W.J., Law of wills, 3rd edn. (1952), vol.1, chaps.1-20; Theobald on Wills, 12th edn. (1963), chaps. 4-13; Jarman, T., A treatise on wills, 8th edn. (1951) vol.1, chaps. 2-15; Parry, op.cit., chaps. 2-7.

"a legal document in English form is used to create an interest unknown to English law [i.e., as we shall see, family property]". (1)

These topics will now be discussed.

(a) Distinction between (i) the validity of a will and (ii) the validity of the dispositions contained therein

(i) Validity of a will

A will is valid if it can be successfully propounded for the purpose of probate. When a will is admitted to probate, nothing more is determined than that the will is, on the face of it, in good form; and that it is the last will and testament executed by a competent testator in the manner prescribed by law. In the recent Nigerian case of Federal Administrator-General v. Johnson and anor.<sup>2</sup>, Coker, J., as he then was, succinctly described the validity of a will for probate in this way:

"By the law of wills it is required that every will probate of which is granted should be free and voluntary expression of a capable testator and that any such will should be properly attested in accordance with the provisions of section 9 of the Wills Act, 1837". (3)

Proof of a will, therefore, is only conclusive of the testamentary nature of the instrument, and the validity of the will as regards the capacity of the testator, form and execution<sup>4</sup>. Probate is not conclusive, for example, of

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1 Sogbesan and ors. v. Adebisi and ors. (1941) 16 N.L.R.26 at p.27.

2 [1960] L.L.R.290.

3 Ibid., at p.293.

4 Thornton v. Curling (1824) 3 Sim.310.

the right of the testator to dispose of the property concerned<sup>1</sup>; or other collateral matters, such as the domicile of the deceased<sup>2</sup>; nor even of the death of the testator<sup>3</sup>. These are generally matters for the determination of a court of construction, that is, they relate to the validity of the dispositions which are contained in the will.

(ii) Validity of the dispositions contained in a will

After what may be termed the external validity of a will has been established and the instrument has been admitted to probate, it is often necessary to determine what property the testator has disposed of or is capable of disposing of; who are the specific persons to be identified as beneficiaries, and subject to what conditions, if any, they take; and in what proportion, if any, the beneficiaries are to share the property left to them. As has been noticed, these are questions to be determined by a court of construction, normally in a separate suit brought for that purpose; or in the part of the process of administration wherein the property is distributed or the rights of the beneficiaries under the will are determined.

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1 Smart v. Tranter (1890) 43 Ch.D.587.

2 Whicker v. Hume (1858) 7 H.L. Cas.124.

3 Moons v. De Bernales (1826) 1 Russ.301.

The distinction between the validity of a will and that of the disposition it contains may be briefly stated: while the former is concerned to see that the will qualifies as testamentary document of the testator, and is not void on account of incapacity, coercion or undue influence; the latter ensures that the property disposed of by the will goes to the proper persons in the manner specified therein. One result of this distinction is that a court of construction is not bound by an opinion expressed by a court in probate proceedings on the construction of a will<sup>1</sup>.

#### Importance of this distinction in southern Nigeria

As will become apparent when we shall consider the decided cases, a testator may make a perfectly valid will in English form; but the court may, in ascertaining the intention of the testator as gathered from the will itself, hold that the validity of the dispositions contained therein must be determined in accordance with customary law, and not English law. The importance of the distinction in an area such as southern Nigeria cannot be over-emphasised: provided that a will in English form complies with the requirements of English law relating to wills, and is, of course, admitted to probate; the rights of the beneficiaries

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1 Theobald on wills, 12th edn. (1963), s.277, p.87.

under the will need not be in jeopardy or doubt, simply because the validity of the dispositions which it contains is governed by a system of law other than English law; or the interests comprised in the gifts are known to that system of law, but not to English law. But for this distinction, the interests which beneficiaries take (under a will in English form) as family property under customary law might have been declared null and void. This point will be fully considered later.

Purposes for which property has been given by testators in southern Nigeria.

Problems of construction

General remarks

Wills made under the English Wills Acts have been used in southern Nigeria to create interests which may be grouped, for the purpose of our discussion, under the following headings:-

- (1) those strictly known only to English law, such as the trust;
- (2) those strictly known only to the customary law, such as the family property; and
- (3) those known to both English and the customary law, such as the gift or legacy.

In their employment of the machinery provided by the Wills Acts, the southern Nigerian testators have, even where literate, often experienced difficulties in expressing in writing, directions in their wills in a way capable of ready interpretation by the courts. These difficulties have largely been due to the paucity of precedents relating to wills; the limited access to professional legal advice or the inability and/or unwillingness on the part of testators to pay for it when this is available; and, above all, the existence of an indigenous tenure under which the great bulk of property has been subject to family interests under customary law, which are no more capable of exact definition than those held by individuals. The following dictum of Butler-Lloyd, J., in Balogun and anor. v. Balogun and ors.<sup>1</sup> illustrates some of the difficulties mentioned above:

"It must not be forgotten that Wills are a new thing in this country, and that testators cannot be expected to make their wishes as clear as in a country where Wills have been made for centuries, where unlimited precedents are available, and where tenure of land is not complicated by the persistence of native custom....." (2)

#### Problems of construction

It is not intended to consider in any detail the rules governing the construction of wills under the general

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1 (1936) 2 W.A.C.A.290.

2 Ibid, at p.295.



law, since the position is not dissimilar from that under English law, to which the reader is referred for a full discussion<sup>1</sup>. Our discussion here will be limited to an examination of the approach adopted by the courts in specific cases, in grappling with the problems of construction and interpretation that confronted them in their attempts to give effect to the intentions of testators - a good proportion of whom made their wills in English form; but who also, as will be seen later, intended nevertheless or must be taken to have intended that the validity of the dispositions contained in such wills should be determined in accordance with the rules of the customary law.

As has already been alluded to, the problems of construction and interpretation will be treated in the form of a running commentary on each of the decided authorities involving such problems. As a general remark, however, it may be stated that the courts have, on balance, been rather liberal in this connection, as may be inferred from the dictum in Balogun's case referred to above. In order to appreciate the attitude of the courts in this matter, however, attention must be drawn to the existence of statutory provisions, which will be considered later, enjoining them not to deprive any person of the benefit

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1 See: Williams, W.J., Law of wills, 3rd edn. (1952) chaps 48-90, esp. chaps. 48 and 49; Jarman, T., A treatise on wills, 8th edn. (1951), vol.1, pp.379-91; vol.III, pp.2065-72; Theobald on wills, 12th edn. (1963), sections 1639-46, 1741-99; Parry, The law of succession, 4th edn. (1961), chap.7.

of any applicable rule of the customary law relating to testamentary succession, among several other topics, provided that the enforcement of such customary law rule does not offend the repugnancy principle.

### INTERESTS CREATED BY WILLS: PROBLEMS OF CONSTRUCTION

#### 1. Interests strictly known only to English law - TRUSTS

The notion of the English trust with its concept of a beneficial ownership of property existing side by side with, and often divorced from, the legal title to that property, is foreign to customary ideas. Witness, for example, the following dictum of Ademola, C.J.F., in Ayinke and anor. v. Ibidunni<sup>1</sup>, regarding counsel's argument that the deceased could constitute a secret trust under customary law:

"Whilst I am not prepared to challenge the above statement of native law and custom made by Counsel, I would substitute the word 'declaration' instead of 'secret trust'. As the learned trial Judge pointed out in his judgement, secret trusts are peculiarly an English concept..... I think they are foreign to and unknown in native law and custom" (2)

The nearest customary concept to the English trust is the institution of family property under which the head of the family has been likened to "a kind of trustee"<sup>3</sup>, and the members as a whole to "the cestui que trust"<sup>3</sup> or beneficiaries.

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<sup>1</sup> (1959) IV F.S.C. 280.

<sup>2</sup> Ibid., at pp.281-2.

<sup>3</sup> Eyo Archibong and ors. v. Etubon Archibong (1947) 18 N.L.R.117 at p.123; per Robinson J.

But this analogy must not be pressed: for, it will be dangerous, for instance, to suppose that the head of the family holds the legal title to the family property as trustee in trust for the members. Indeed, as a writer has expressed it:

"the peoples of West Africa would be surprised if they were told that the heads of their families owned the legal estate to family land".(1)

From the trust point of view, the best way of referring to the institution of family property is, perhaps, to say that both the legal title to, and the beneficial ownership of, the property co-exist; and both are in the members of the family as a whole. In this connection, we may note the dictum of Graham Paul, J., in Taylor v. Williams and anor.<sup>2</sup> when he observed:

".... the correct view is at any moment that the ownership of the family property is vested in the whole family as trustees for the whole family". (3)

Nevertheless, persons leading a customary mode of life have created or attempted to create trusts by their wills. The majority of such trusts have been private in the sense that they were meant to benefit individuals, usually members of the testator's families. This is not surprising since deceased persons rarely leave their

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1 Daniels, W.C.E., "Some principles of the law of trusts in West Africa", [1962] J.A.L.164 at p.169.

2 (1935) 12 N.L.R.67.

3 Ibid, at p.70.

property to someone who is completely a stranger by blood. However, there have also been several instances of charitable or public trusts. We may now examine the cases involving these trusts.

(a) Private trusts

In Abasi v. Kopon and ors.<sup>1</sup>, the eldest son of the testator asked for an interpretation of a clause in his father's will. The relevant clause read:

"I hereby authorise my executors to give and bequeathe to my sons and daughters who love and served me wilfully (sic) and also follow my advice who act not as traitor to me during my lifetime from the eldest to the young babes on hand as each of them may deserve."

The testator, however, directed his executors not to allow his eldest son, the plaintiff, "to step his foot in any of my compounds after my death neither to have a pin's head in any of my estate".

The point for decision was whether the testator's directions operated as a devise of his estate to the executors in trust for his children other than the plaintiff; or whether they were void and intestacy resulted, in which case the plaintiff would apparently be one of the beneficiaries to be ascertained.

It was contended on behalf of the plaintiff that

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1 (1921) 5 N.L.R.61.

the trust for the testator's children as a whole must be void on the grounds of uncertainty, both as to the individuals or class who were to be the beneficiaries and also as to the proportion of the trust property to which each individual was entitled. It was held that the words contained in the relevant clause in the will constituted a general devise and bequest of the testator's real and personal estate to the executors in trust for the children of the deceased, other than the plaintiff, in such shares as the executors in their discretion should determine. Though the testator did not specifically devise his property to the executors by his will, the Court felt that the principle established in the decision of the Privy Council in Shaw and anor. v. Taylor and anor.<sup>1</sup> applied, namely: that where a will contains no express and formal devise of the trust property to the trustees; but such a devise can be collected from the provisions of the will, the court can and will supply the words necessary to constitute the formal devise, and so carry out the intention of the testator rather than that an intestacy should result. To Van der Meulen, J., the effect of the relevant clause in the testator's will was to create a discretionary trust, leaving the executors with the discretion to select the

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1 (1918) 3 N.L.R. 80, Supreme Court, Lagos; Privy Council's decision at pp.82-4.

objects of the trust from a specified class of persons, that is, the testator's children who loved and served him 'wilfully' (sic.); who obeyed his advice and who were not traitors to him. In the course of his judgement, he stated the point in this way:

"In my opinion what the testator has done is to create a discretionary trust such as is well known to the law. The class from which the objects of the trust are to be selected is very clearly defined, and the test which is to be applied in making the selection is also stated in unequivocal terms, and it is moreover one which the trustees should find no difficulty in applying. As regards the question of the subject matter of the trust, here again there is no ambiguity, for it is clear the testator intended the whole of his estate to be included." (1)

In Branco & ors. v. Johnson<sup>2</sup>, the trust constituted by the testator's will followed the English form under which the income from property is left to the children for life with remainder over to their children. There, the testator devised certain real property to trustees in trust "to let the same and collect the rents thereof; and (after always deducting therefrom the expenses for the repairs and the maintenance and education of my children and grandchildren....), to distribute the balance equally among my children .... and after their death, the said rents should be distributed among their children per stripes. I desire and declare that my said houses shall never be sold."

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1 (1921) 5 N.L.R. at p.66.

2 {1943} 17 N.L.R. 70. See also, Alake v. Halid and anor.  
{1935} 12 N.L.R.22, where the property was devised to trustees upon trust to apply the rents and profits therefrom as to one-half for the repair and upkeep of the property; and as to the other half for the maintenance of the testator's son and daughter in equal shares.

The plaintiffs were the majority of the beneficiaries under the trust, and they sought an order of the court for the sale of the trust property and for the distribution of the net proceeds among those entitled. In short, they sought to put an end to the trust, all the beneficiaries having attained majority at the date action brought. The defendant, the testator's eldest daughter, opposed a sale of the property on the ground that it was the intention of the deceased to create family property under customary law, and not a trust under English law. Baker, Ag. C.J., rejecting the contention that the devise created family property under customary law, decided that a valid trust under English law was created by the terms of the will; but that the trust affected the rents issuing out of the property. There were two grounds for his decision. First, he held that the property was always let to tenants during the lifetime of the testator. Second, that the bequest followed the English form in that the income from the property had been left to the testator's children for life, with remainder over to their children. He, however, ordered that the property should be sold and the proceeds distributed among the beneficiaries under the will.

(b) Charitable trusts

Wills have also been employed in southern Nigeria

for the purpose of constituting public or charitable trusts. Of the three cases involving charitable trusts which have been reported, one was held to be validly created; one failed completely, and a third was partially upheld.

In In the Estate of Tom Jones: Shaw and anor. v. Taylor and anor.<sup>1</sup>, the testator, by his will appointed the appellants and another to be his executors and trustees, and directed them to build a hall for the absolute use of his countrymen of the Lagos community for public meetings and as a library. The building, when erected, was to bear his name and to be known as such for ever. His will did not, however, contain any clause expressly and formally devising to the trustees the property on which the hall was to be built.

The children of the testator claimed that as there was no formal devise of the property to the trustees, it never vested in any manner in them; and that there was an intestacy under which they (the testator's children) were entitled.

Both the Divisional and the Supreme Court of Lagos held that the claim must succeed as in the absence of a specific devise of the property to the trustees, it could not be implied that the property in question was legally

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<sup>1</sup> (1918) 3 N.L.R.80, Supreme Court, Lagos; (1920) 3 N.L.R. 82, Privy Council.



affected by the terms of the trusts. There was, therefore, an intestacy and the testator's children were the persons entitled.

The trustees appealed to the Privy Council which allowed the appeal. The grounds on which the appeal succeeded were (i) that the property was, by the terms of the will, impressed with a permanent trust, notwithstanding the absence from the instrument of an express and formal devise of it to the trustees; and (ii) that, having regard to the expressions contained in the will, the document should be construed as effecting a devise of the property to the trustees for the purposes of the trusts declared therein. Viscount Cave, who delivered the judgement of the Board, said:

"The declaration that the building when erected .... shall 'be and remain' for the use of the Lagos community for ever, and that the library 'shall be available' for the use of readers shows that the property is to be affected with a permanent trust. Further the appointment by the testator of certain persons as 'trustees of the said building' with powers of management indicates that the building when erected is to be transferred to those persons absolutely upon the trusts declared; and for this purpose the fee simple must be vested in the trustees of the will. It is true that the will contains no express and formal devise of the property to the trustees; but unless such a devise is to be collected from the terms of the will the whole of

the elaborate trusts declared by the testator are upon the face of them nugatory and of no effect. In their Lordships' opinion this cannot have been the testator's intention; and having regard to the expressions above quoted, the will can and should be construed as effecting a devise of the property to the trustees." (1)

In In the Will of Wright; Lumpkin and anor. v. De Souza and ors.<sup>2</sup>, the testator, a Wesleyan minister, bequeathed his leasehold property to trustees upon trust to his church for the purpose of erecting a parsonage; but with a gift over to his sister, if in the opinion of the trustees, the land was not large enough. He also devised his two farms to the trustees, directing that the proceeds should be used in supporting his Church; but that if that body found it impracticable to keep the farms, it should receive only one-half of the proceeds, while the other half should go to his sister, one of the respondents.

The trustees of the will petitioned for the determination of the rights of the testator's sister under the will. Webber, J., decided that she had no beneficial interest in the leasehold property, since it passed as devised to the trustees upon the trust declared in the document. As for the two farms, however, he held that there was uncertainty as to the title of the Church on the ground that the will did not specify the destination of the farms in the event of that body finding it impracticable to

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1 Ibid, at p.84.

2 (1929) 9 N.L.R.81.

maintain them. But, in order to give effect to the testator's intention, which was that both the Church and his sister should benefit, he ordered that the farms should be sold and the proceeds divided equally between both classes of beneficiaries.

In Iyanda and ors. v. Ajike and ors.<sup>1</sup>, the point for decision was whether a clause in the testator's will had enough charitable purpose so as to constitute a charitable trust for the advancement of religion. The relevant clause in the will directed the trustees as follows:

"My property ..... should not be sold under any circumstances the same should be let and the rents accruing therefrom should be deposited in the Bank .... for the upkeep of Hunmu Oshikiti's Mosque".

The will also contained other provisions regarding the following details, namely: that the mosque was to be a private room in the testator's dwelling house; it was to bear his name, and used for prayers by the members of his family; and the selection and appointment of the leader in charge of the mosque was to be made by the members of his maternal family.

On these facts, Baker, S.P.J., held that there was no charitable purpose in the clause, since there was no indication that the public would be admitted to the mosque

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1 (1948) 19 N.L.R.11.

in the private room of the testator's dwelling house.

The learned Judge observed, inter alia:

"Religious purposes are charitable only when religious services tend directly or indirectly towards the instruction or edification of the public....." (1)

#### THE ESTATE TAIL

In Jenmi v. Balogun and ors.<sup>2</sup>, the testator, by his will, specifically devised certain real property to his son "and his children". Soon after he had acquired the property and during his lifetime, the testator put his son into possession. The son thereafter occupied the property as his own home, being married there and having children born to him and living with him there. The defendants obtained judgement against the testator's son in pursuance of which they attached the property in question. The plaintiff was one of the children of the son, and brought these proceedings to release the property from attachment on the ground that it was family property; in respect of which his father (then deceased) had no separate and identifiable interest which could be attached.

The question that fell to be determined was the construction to be put on the devise of the property to the son "and his children". Graham Paul, J., following

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1 Ibid, at p.12.

2 (1936) 13 N.L.R.53.

the English authority of Webb v. Byng<sup>1</sup>, decided that the testator intended to create an estate tail for his son and the latter's children. The learned Judge attached much importance to the contrast between this clause creating the entailed interest, and another clause in the will wherein the testator specifically devised his own dwelling house as family property; and the fact that the testator's son had gone into possession of the entailed property during the lifetime of the testator, and had occupied and treated the house "in every respect as his home".<sup>2</sup>

As regards the further question as to whether the son's interest in the estate tail was attachable, the learned Judge was of the view that it clearly was attachable by virtue of the Rules of the then Supreme Court Ordinance<sup>3</sup>, under which immovable property or any interest therein was subject to attachment.

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1 (1856) 69 E.R.951.

2 (1936) 13 N.L.R.53, at pp.54-5.

3 Then, Order 45, Rule 10. These provisions are now contained in the Judgements (Enforcement) Rules, cap.189, Laws of the Federation of Nigeria and Lagos, 1958. Section 2 of the current Rules gives an interesting definition of "immovable property" which runs as follows: "immovable property" includes any right, title or interest in immovable property. Cf. the current Interpretation Act, No.1 of 1964, where "immovable property" is defined in s.18(1) as land.

(2) Interests strictly known only to customary law -FAMILY PROPERTY

As a device for the holding of property, the institution of family property is unknown to English law<sup>1</sup>. It is a concept generally found among all the peoples of southern Nigeria. Its highest development, however, may be said to have been attained among the Yoruba where it is commonly employed in connection with the establishment of the "family house"<sup>2</sup>. As its name implies, the purpose of a family house, usually containing many rooms, is to provide residence for the members of the family.

In the majority of cases, family property comes into existence by the operation of the rules of the customary law relating to intestacy. In other words, on the death of the original owner, his property devolves upon the members

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1 See, for instance, Butler Lloyd, J.'s dictum in Sogbesan and ors. v. Adebisi and ors. (1941) 16 N.L.R.26, at p.27.

2 For the family house among the Yoruba, see: Coker, op.cit., pp.40 and 41, 149-51; Lloyd "Some notes on the Yoruba rules of succession..." [1959] J.A.L.7, at pp.12-14, 21 and 26-32; Lloyd, "Family property among the Yoruba" ibid; pp.105-115; Lloyd, Yoruba land law pp.78 ff and 298 ff. Other peoples of southern Nigeria usually hold their family interests in other forms of property, such as land, plantations, or bodies of water (streams, lakes, ponds, etc.). For the position among the Ibo, see Obi, The Ibo law of property (1963) pp.171-6.

of his family, at all events on his children, as family property. However, for reasons which will be stated later, a testator may sometimes prefer to create family property by his will rather than leave the matter to the operation of law. The testamentary power of the deceased to create family property was confirmed by the West African Court of Appeal in the case of Young v. Young<sup>1</sup>, where Foster-Sutton, P., delivering the judgement of the Court, said, inter alia:

"Family property is a form of tenure indigenous to Nigeria, well known and understood, and I am of the opinion that the testatrix clearly intended to create family property by her devise and that it can be created by a testamentary instrument." (2)

### Definition

#### Family property

Family property may be defined as property collectively owned and usually enjoyed in common, by the members of the family; but in respect of which no individual member has a separate and identifiable interest capable of being disposed of inter vivos, or transmitted at his death. The interest of each member of the family in the family property has been appropriately described as "a right of user during his or her life".<sup>3</sup>

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1 [1953] W.A.C.A. Cyclostyled Reports 19.

2 Ibid, at p.21.

3 Taylor v. Williams and others (1935) 12 N.L.R. 67, at p.70; per Graham Paul, J.

As already stated, the institution of family property among the Yoruba usually takes the form of the family house designed as the residence set apart for the members of the family. A clear, if somewhat long, definition of the Yoruba family house occurs in the judgement of Carey, J., in the case of Coker v. Coker and ors.<sup>1</sup>, where the learned Judge said:

"A family house ..... is a residence which the father of a family sets apart for his wives and children to occupy jointly after his decease. All his children are entitled to reside there with their mothers and his married sons with their wives and children. Also a daughter who has left the house on marriage has a right to return to it on deserting or being deserted by her husband. No one has any chargeable or alienable interest in the family house.."2

The construction of the word "family" in wills creating family property

In construing the term "family" occurring in a will, the courts have, in keeping with their function of seeking to give effect to the intention of the testator, refrained from adopting a rigid attitude; and have instead left it to the testator himself to fix the range of the membership of the family entitled to participation in the enjoyment of the family property created under the will. If he, as will appear later, extends such membership of the family so that it covers his remoter kin who ordinarily would not have been included under the customary law rules;

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1 (1938) 14 N.L.R.83.

2 Ibid, at p.86.



or restricts the meaning of the term by excluding from participation in the enjoyment of the property created, an admittedly rightful member of the family; or, indeed, varies the normal customary rule regarding the appointment of the new head of the family, the court will give effect to his wishes in so far as these can be gathered from his testamentary document.

As indicated in the general remarks on the problems of construction, a discussion of the authorities establishing the propositions stated in the last paragraph is to await an examination of the actual cases involving the construction of wills in which there was a dispute as to the meaning to be attached to the word "family" appearing in such wills. It may, however, be stated here that the word as used by the testator in Sogbesan and ors. v. Adebisi and ors.<sup>1</sup>, was held to have been intended by him to include not only his children, but his brothers and sisters as well as the descendants of these persons.

Expressions necessary for the creation of family property

The proper words to create family property are, of course, "family property" or expressions to the effect that the property should be held and enjoyed in common by members of the family. These are usually followed

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1 (1941) 16 N.L.R., 26.

by provisions prohibiting the alienation of the property so created. But, as the cases show, no particular expressions are necessary. It is sufficient if the court can, on a true construction of the will, find an intention on the part of the testator to create family property by his testamentary document.

Where the proper words have been employed

In Jacobs v. Oladunni Brothers<sup>1</sup>, a testator, by his will, devised certain property to all his four children to "remain and be retained as a 'family property' in accordance with native law and custom"; with a direction that "the said property shall not on any account whatever be alienated or sold....." It transpired that three of the testator's children became judgement debtors and the property became attached by their creditors, the defendants in this suit. The plaintiff, who was the fourth child of the testator, sued claiming that the property be released from attachment on the ground that it was family property, in respect of which the other three children had no separate and identifiable interest capable of being attached for their debts.

Graham Paul, J., following the earlier case of Ayeni v. Miller Brothers<sup>2</sup>, held that the plaintiff's claim

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1 (1935) 12 N.L.R.1.

2 (1924) 5 N.L.R.42; where, however, the family property was created by operation of law, i.e. intestacy.

must succeed on the ground upon which it was based.

In the case of In the Estate of Edward Forster: Coker v. Coker and ors.<sup>1</sup>, the words employed by the testator were as follows:

"I leave my present dwelling house to the whole of my family or blood relatives and their children's children throughout and cannot be sold for any debt or debts that may be contracted by any of them....." (2)

It was decided that family property was properly created.

The words "the said premises to be reckoned family property to perpetuate my memory ... under no circumstances should it be sold or alienated"

occurred in the will that came before the court in Shaw and ors. v. Kehinde and ors.<sup>3</sup> One of the points for

decision in that case was the effect of the words quoted, upon an earlier provision in the will which read:

"the house shall remain for his [i.e. the testator's son's] absolute use and benefit;" but which also directed that

the family property was to come into being after the death of the testator's son . Was this devise an absolute gift of the house to the son; or was there a limitation of his title to a life interest?

It was contended on behalf of the testator's son and

1 (1938) 14 N.L.R.83.

2 Cf. Young v. Young [1953] W.A.C.A. Cyclostyled Reports 19, at 21; where the words used were: "all my relatives". It was, of course, held that family property was validly created.

3 (1947) 18 N.L.R.129.

other plaintiffs that the devise was an absolute gift to the son; and that the subsequent limitation was inconsistent with the devise, and, hence, must fail. Brooke, J., decided that family property was created after the death of the son on the ground that the effect of the limitation was to cut down his title to a life interest.

In Sogbesan and ors. v. Adebisi and ors.<sup>1</sup>, it was, of course, not disputed by the parties that the direction of the testator that his landed property should be held "as family houses" properly created family property. The dispute that arose was in connection with the meaning to be attached to the word "family" which was also contained in the will. It will be recalled that the court held that the word was intended by the testator to cover not only his children, but his brothers and sisters as well as the descendants of these persons.

Where the intention to create family property may be collected from the will

It has been stated that no special words are necessary for the creation of family property; and that it is

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1 (1941) 16 N.L.R.26. See also Balogun and anor. v. Balogun and ors. (1935) 2 W.A.C.A.290, where it was agreed by the parties, and unanimously decided by the Court, that family property was created; but where the dispute centred round certain out-of-pocket payments made by the trustees to the new head of the family. In the determination of this point, however, the decision was by a two to one majority.

essentially a question of construction, wherein the real intention of the testator is ascertained so far as this can be done from the terms of his will. Thus, the fact that a testator has employed English terms in designating the interests of the beneficiaries under his will is not conclusive against his intention to create family property by his testamentary instrument. This point arose in a neat form in the case of George and anor. V. Fajore<sup>1</sup>.

There the testator, by his will, devised his property to twelve named persons, "their heirs and assigns for ever as tenants in common without any power or right to alienate or anticipate the same or part thereof".

After the testator's death, his executors allotted a portion of the devised property to one of the beneficiaries. On the death of this beneficiary, his son took possession of the portion allotted to his father by the executors, the plaintiffs in this action. When this child died, however, the defendant (the widow of the testator and grandmother of this child) went into possession of the allotted portion, claiming to be entitled as next-of-kin of the deceased child. The plaintiffs (executors) sought to recover possession of this portion of the property as well as the sum of £30 for its use and occupation by the defendant.

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1 (1939) 15 N.L.R.1.

The plaintiffs' argument was that notwithstanding the use of the words "~~tenants~~ in common" in the devise, the intention of the testator, as gathered from the whole tenor of his will, was to create family property under customary law. For the defendant it was argued that the effect of the words occurring in the will was to create a tenancy in common according to English law; and that upon the death of her grandchild, his separate interest (the allotted portion of the property) descended to her as next-of-kin.

Butler Lloyd, J., held that it was the intention of the testator, as collected from his will, that the devised property should be held as family property. In arriving at this decision, the learned Judge was influenced by three considerations. The will contained a provision prohibiting the alienation of the property. There was also a clause directing the executors to maintain the property out of rents accruing from part of the premises to be let by them. Finally, had English law applied as contended by the defendant, she still would not have succeeded in the absence of proof of the death of the deceased child's mother, who would take as next-of-kin to the exclusion of the defendant, a grandmother.

Subject-matter of family property

The interest out of which family property may be created by will may take any form. It may be unbuilt land; or, as is usual among the Yoruba, a dwelling house; or a fund. What is essential is that the interest must be the self-acquired or individual property of the testator. This is because a testator creating family property by will is really making a gift of such property to the members of the family; and it presupposes that the property so given is his to give.

But the fact that the testator acquired his individual or private interest by means of a conveyance in English form is not a bar to his creating of family property out of such interest. In Jacobs v. Oladunni Brothers<sup>1</sup>, it was contended, in effect, that, having acquired the property under an English conveyance in fee simple, the testator could not leave it, by his will, as family property to his children. It was further argued that the interests of the testator's children, to whom the property was devised as family property, were those of tenants in common under English law; and were attachable for their judgement debts.

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1 (1935) 12 N.L.R.1 Cf. Jenmi v. Balogun and ors. (1936) 13 N.L.R.53 at p.55, where the testator expressly declared in his will that his dwelling house should remain family property after his death; but where he devised it to certain named children and their heirs "as joint tenants". The court nevertheless held that the devise constituted family property.

Graham Paul, J., wasted no time in rejecting this submission by the judgement creditors. He held that what was important was the intention of the testator which, in this case, was that the property should be held as family property.

#### WILLS CREATING BOTH TRUSTS AND FAMILY PROPERTY

In some of the cases, both the trust and the family property are created by one and the same testamentary document. In these cases, the property is devised to trustees with directions that they should hold the same in trust, and as family property for the testator's family. This was the position in the cases of Balogun and anor. v. Balogun and ors.<sup>1</sup> and Sogbesan and ors. v. Adebisi and ors.<sup>2</sup>.

In Balogun and anor. v. Balogun and ors.<sup>1</sup>, the testator left both his real and personal estate to trustees, who were not members of his family, upon trust for his children. He provided, however, that the rights of the children under the trust should be in accordance with customary law, for one of the clauses in the will directed that all his property "should be taken to be one aggregate and should remain.... the family house with the incidents of native law and custom thereto attaching".

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1 (1935) 2 W.A.C.A.290.

2 (1941) 16 N.L.R.26.



He also provided that his eldest son should be the new head of the family, and should perform the duties incidental to that office. He did not, however, authorise the trustees to pay the new head any allowance out of the trust fund for the discharge of his duties. The trustees, nevertheless, paid him a monthly allowance of £10 out of the trust fund to reimburse him in respect of the expenses incurred as head of the family. The West African Court of Appeal was unanimous in the view that both the trust and family property were validly created. Where the Court was divided was as to the propriety of the monthly allowance paid by the trustees to the new head of the family; a point we shall have occasion to treat fully later on, in connection with the role of trustees appointed in these circumstances.

Similarly, in Sogbesan and ors. v. Adebisi and ors.<sup>1</sup> the testator devised his real property to trustees upon trust to hold the same as "family houses". Unlike the testator in Balogun's case<sup>2</sup>, however, he passed over his eldest son, and appointed his own (testator's) brother to be head of the "family"; and directed the new head to act in family matters under the control, direction and advice of his (testator's) mother and aunt. Again, there

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1 (1941) 16 N.L.R.26.  
 2 (1935) 2 W.A.C.A.290.

was no dispute in respect of the family property and trust created. But there was a difference regarding the word "family" used by the testator in his will. As already noted, the court held that that word was intended by the testator to include not only his children, but his brothers and sisters as well as the descendants of all these relatives.

#### ROLE OF THE TRUSTEE IN THE INSTITUTION OF FAMILY PROPERTY

The two cases just discussed make it clear that it is perfectly feasible for a will to create both the trust and family property; or, better still, to superimpose the former concept on the latter institution. This at once raises the question of the role of the trustee in the institution of family property. The view has been expressed by an authority on family property among the Yoruba that trustees appointed in respect of family property are entirely redundant, on the ground that that institution does not recognise trustees as such<sup>1</sup>. While one may not deny the general position that customary law has no exact counterpart of the English trustee, one must take leave to disagree if the learned writer's view is meant to suggest that such trustees, who are, after all, appointed under the general law, have no duties to per-

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1 Coker, Family property among the Yorubas, p.75.

form in respect of the management and control of the property (family property) created under the will.

It is, of course, not open to argument that the legal title to the family property in this case is in the trustees; and that their co-operation may be essential where the members of the family wish to bring the institution to an end by the sale or partition of the property. Where the family property consists of funds, the trustees, who are usually not members of the family, take charge of these. Thus, in Balogun's case<sup>1</sup>, this possession of the trust fund by trustees was emphasised by Graham Paul, J., when he said, inter alia:

"The persons in charge of that fund are not members of the family but trustees very carefully chosen by the testator." (2)

It hardly needs emphasising that the trustees in such a case have an important role, namely: that of ensuring that the trust fund is not misapplied or dissipated.<sup>3</sup>

Again, Balogun and anor. v. Balogun and ors.<sup>1</sup>, makes it quite clear that the trustees of family property are not entirely redundant. On the contrary, and in addition to their duties with respect to the preservation and

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1 (1935) 2 W.A.C.A.290.

2 Ibid, at p.301.

3 Cf. Park, The sources of Nigerian law, p.39, where Balogun's case, op.cit., is discussed.

management of the property, they are given powers by the testator to enforce his directions disinheriting any member of the family whose conduct may lead to a break-up of the family property. In that case, the trustees were specifically enjoined to exclude from the enjoyment of the property created any child of the testator "who became quarrelsome or cause litigation or who insisted on partition of the family house". (1)

Position of head of the family where trustees are appointed in respect of family property

If a will creates family property without, at the same time, constituting a trust of such property, the duty of administering the property is primarily that of the head of the family<sup>2</sup>. He is not usually paid for his management and control of the family property, though he is entitled to be reimbursed for his out-of-pocket expenses in respect of his duties as head of the family.

Where trustees are appointed in respect of the

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1 Ibid, at p.300.

2 On this see: Elias, Groundwork of Nigerian law (1953) pp.325-6; Elias, Nigerian land law and custom (1962) pp.140-149, and the authorities cited therein; Meek, Land tenure and land administration in Nigeria, pp.131, 155-6 and 178; Coker, Family property among the Yorubas (1958), chaps. 6 and 7, especially at pp.121, 135 and 153-4.

family property, however, the head of the family is superseded by them in the administration of the property by reason of the trust superimposed on the family property. But the fact that the trustees have the management and custody of the family property does not affect the right of the head of the family to be reimbursed out of the property for expenses incurred by him in respect of his other duties as such head. In this regard, it must be observed that the fact that the testator's will is silent on the new head's right to such reimbursement does not make any difference. He still gets his out-of-pocket expenses, to which he is entitled under customary law; and not under a will. This point is well illustrated by the case of Balogun and anor. v. Balogun and ors.<sup>1</sup>, which will be discussed in the next paragraph.

In Balogun and anor. v. Balogun and ors.<sup>1</sup>, the testator, by his will left all his property to trustees who were to hold same as family property for his children. But, although he appointed his eldest son to be head of the family and directed him to perform all the duties pertaining to this office, he made no provision in his will for the payment of any allowance to the eldest son. The new head of the family discharged his duties and incurred

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1 (1935) 2 W.A.C.A.290.

expenses. To reimburse him, the trustees paid him a monthly allowance of £10 out of the trust fund. After some time, the payment of this allowance was opposed by two of the testator's daughters, the plaintiffs in this suit. They sued the trustees seeking an order asking the latter to refund the sums already paid; and restraining the trustees from making any further such payments. They alleged that such payments constituted a breach of trust on the part of the trustees.

It will be appreciated that the point for decision depended upon whether the validity of the dispositions contained in the will was governed by English law or customary law: for, under the former system there was a clear instance of a breach of trust; while under the latter system, no breach of trust had been committed, since the head of the family was entitled to be reimbursed for his out-of-pocket expenses incurred in family matters.

Butler Lloyd, J., held that the frequent use of the phrase "according to native law and custom" by the testator clearly showed that it was his intention that customary law should govern the validity of the provisions in his will. Consequently, the monthly allowance of £10 paid by the trustees to the testator's eldest son as head of the family was rightly made by them. The learned

Judge was at pains to point out that his decision rested to a great extent on a provision contained in section 20 of the then Supreme Court Ordinance<sup>1</sup>. That section provided that no person shall be deprived of the benefit of any applicable customary law, particularly<sup>2</sup> in causes and matters relating to inheritance and testamentary dispositions, amongst other things, where such customary law satisfied the repugnancy principle. The implication of such a provision was, according to the learned Judge, to avoid a too rigid judicial attitude in the construction of a will, where this would have the effect of depriving a beneficiary of the rights of succession accruing to him under customary law; unless where the enforcement of such rights would be repugnant to natural justice, equity and good conscience. The reasoning of the learned Judge is succinctly stated in a passage reproduced in the report of the case when it was heard on appeal. It reads:

"It was no doubt for the purpose of giving effect to the real intention of a testator and of avoiding the necessity of too rigid adherence to the ipsissima verba of a Will that testamentary dispositions were included in section 20. In my view no breach of trust has been committed here.

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1 (1914), cap.3 (section 20), Laws of Nigeria, 1923 edn. The present enactments are all contained in the various High Courts and Magistrates' Courts statutes. For the provisions contained in the High Courts statutes, see: the High Court of Lagos Act, cap. 80, s.27, op.cit.; the High Court Law, Western Region, cap.44, s.12, op.cit.; the High Court Law, Eastern Region; No.27 of 1955, s.22.

2 This part of the section of the former Supreme Court Ordinance, containing particular provisions with respect to matters relating to testamentary dispositions, etc., is not repeated in the various current enactments cited above.

To hold otherwise would in the present case result in depriving the person designated as head of the family of the benefit of his customary right to reimbursement for the expenses necessarily thrown upon him by his position." (1)

The decision of the learned Judge was upheld by the West African Court of Appeal by a two to one majority; Aitken, J., dissenting on the ground that there was no proof of the customary law entitling the new head of the family to such payment, in the absence of a provision to that effect contained in the testator's will. Graham Paul, J., on the other hand, was of the opinion that reference to section 20 of the then Supreme Court Ordinance, while not being irrelevant, represented a narrow view; and that the broad view of giving effect to the intention of the testator as expressed in his will was the better approach.

#### Reasons behind the creation of family property by wills

The effect of the operation of the rules of the customary law governing intestacy is that the self-acquired property of a deceased intestate is converted into family property owned and usually also enjoyed in common by members of his family. This being so, it may, at first sight, be difficult to understand the need for the establishment of the institution of family property by will; when by the operation of law the result will be precisely the same

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1 See footnote 2 on page 498 .



where the deceased has left no will to that effect.<sup>1</sup>

It must, however, be observed that family property arising on intestacy may not possess the same enduring nature as that specifically created, usually with restrictions against alienation, by a testamentary document. The customary rules relating to intestacy are largely concerned with prescribing the manner in which the deceased's estate is to be distributed; and the members of the family may agree among themselves to effect the partition or sale of the family property, and so put an end to that institution. Where, however, the institution is brought into existence by the will of a testator, imposing the usual restrictions against sale or partition, the hands of the members of the family are thereby tied; and, as long as the property still serves its purpose as the family residence, the court will not order a sale or partition thereof "merely because some of the interested parties desire to turn the property into cash". (2)

The reasons, then, why a testator may wish to create family property by his will rather than leave the matter to the operation of law, may be briefly stated. Firstly,

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- 1 "I hold that under the Will the property in question became a 'family property' as effectively as if the children had succeeded to it under native law and custom". Jacobs v. Oladunni Brothers (1935) 12 N.L.R.1 at p.2, per Graham Paul, J.
  - 2 Bajulaiye and anor. v. Akapo (1938) 14 N.L.R.10, at p.11; per Butler Lloyd, J. It is not, however, clear from the report of the case whether the family property in respect of which the plaintiffs sought an order for partition or sale, was created by will or by the operation of law.

he may hold the view that what will become family property on his death intestate has been the result of his own exertions; and, hence, ought to be regarded more as a monument to perpetuate his memory, and less as an ordinary building to provide residential accommodation for the living members of the family. Secondly, while not being unmindful of his duty to provide for the needs of his dependants, he may wish that family property should be kept in the family for as long as possible in order to perpetuate and unite the family, both dead and living. Thirdly, he may define in his will the extent of the membership of the family it is his intention to benefit from the family property created thereby. Fourthly, he may specify in his will the sanctions to be applied to those members of the family whose conduct may render the continuance of the institution of family property impossible. Fifthly and finally, he may, if he was also head of the family, nominate a more eligible and competent member of the family as his successor to ensure the continuance and efficient management of the institution; rather than allow the normal successor, who may be less suitable, to be such head. These points will now be illustrated from the decided cases.

#### Perpetuation of testator's memory

Perhaps the clearest example in this regard (i.e.

the intention of a testator to employ the institution of family property to perpetuate his memory) is that offered by the clause in the will that came before the court in Shaw and ors. v. Kehinde and ors<sup>1</sup>. As already noticed, part of the clause provided that the testator's dwelling-house should be regarded as "family property to perpetuate my memory".<sup>2</sup>

#### Retention of the property within the family

Where the family property takes the usual Yoruba form of a large family residence, the intention of the testator creating it by his will is, as a rule, that such residence should be retained by the family for as long as possible. In Balogun and anor. v. Balogun and ors.<sup>3</sup>, for example, one of the clauses in the testator's will directed that the family property created therein should be retained for at least "the period of twenty-one years after the testator's death or such period as is allowed by native law and custom." (4)

This enduring aspect of the institution of the family property has been likened to the English strict settlement, by an eminent writer, who says:

"The institution of the 'family house' is thus the Nigerian counterpart of the English strict settlement, the aim of both being to keep the property in the family for as long as possible." (5)

1 (1947) 18 N.L.R.129.

2 Ibid., at p.130.

3 (1935) 2 W.A.C.A.290.

4 Op.cit., at pp.291,298,300,301,304 and 306.

5 Elias, Nigerian land law and custom (1962), p.268.

The institution also serves two other purposes.

The common residence or enjoyment of the family property by the members of the family helps to cement the common ties of blood; and shape the family as a close-knit social and economic unit. It enhances what a testator has described as the "prestige, dignity and reputation"<sup>1</sup> of the family. We have stated that where family property has been created by the operation of law, the members of the family may sooner or later put an end to that institution by effecting a partition or sale of it. Now, the distribution (for sale or partition is nothing else) often leads to family disputes and quarrels, which in turn may undermine the unity of the group. One of the aims of a testator in creating family property by his will is to ensure that the family property is retained for generations; and the solidarity of the family is thereby maintained. Graham Paul, J., made this point in the case of Balogun and anor. v. Balogun and ors.<sup>1a</sup>, cited above, when he said, inter alia:

"Such distribution often leads to family feuds, sometimes to a complete disruption and disappearance of the family as a real unity. The large numbers of partition or sale suits in the Divisional Court at Lagos in the last ten years are evidence of that. The late Alli Balogun from the terms of his Will was obviously very well aware of that... He wanted to deal with all his properties ... so as to

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1 The testator in Balogun's case, see (1935) 2 W.A.C.A. 290, at p.296.

1a (1935) 2 W.A.C.A.290.

avoid disputes. But above all he desired to perpetuate his family house and his family." (1)

It will be recalled that whether a testamentary document has created family property or not is essentially a question of interpretation to be determined by collecting the intention of the testator from his will; and not by paying undue regard to the form of words he has employed in describing the interest created thereby. In the majority of cases, however, the wills creating this kind of interest have, in addition to the term "family" or "family property" contained therein, expressly imposed prohibitions against the sale, partition or any other form of alienation of the family property created thereby. The words commonly employed in imposing such prohibitions include the following:

- (i) on any account whatever be alienated or sold....  
always remain and be retained as a "family property";<sup>2</sup>
- (ii) without any power or right to alienate or anticipate  
the same or any part thereof;<sup>3</sup>
- (iii) in no case and under no circumstances should it be  
sold or alienated;<sup>4</sup>
- (iv) none of these properties be sold, mortgaged or in  
any other way alienated;<sup>5</sup>

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1 Op.cit., at p.300.

2 Jacobs v. Oladunni Brothers (1935) 12 N.L.R.1.

3 George and anor. v. Fajore (1939) 15 N.L.R.1.

4 Shaw and ors. v. Kehinde and ors. (1947) 18 N.L.R.129.

5 Ayoola and ors. v. Folawiyo and ors. (1942) 8 W.A.C.A.39.

- (v) should on no account be sold or partitioned;<sup>1</sup> and  
 (vi) cannot be sold for any debt or debts that may be  
 contracted by any of them<sup>2</sup>.

"Family" for the purpose of admission to participation in  
 the enjoyment of family property

It has already been seen that the testator is given a free hand in deciding the scope of the membership of the family he intends to benefit by the family property he has created by his will. In this way, he is enabled to vary the normal rules of inheritance, and may include a remote relative in the enjoyment of the family property, even where the latter would ordinarily not be entitled had the testator died intestate<sup>3</sup>; or exclude from participation in the enjoyment of the family property created, his eldest son and principal heir<sup>4</sup>.

Making family members co-operate in their enjoyment of  
 family property. Consequences to members attempting  
 to put an end to the institution

This point forms part of the larger one, which is, the intention of the testator that the property created

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- 1 Young v. Young [1953] W.A.C.A. Cyclostyled Reports 19.  
 2 In the Estate of Edward Forster: Coker V. Coker and ors.  
 (1938) 14 N.L.R.83.  
 3 See: Sogbesan and ors. v. Adebisi and ors. (1941) 16  
 N.L.R.26.  
 4 See: Abasi v. Kopan and ors. (1921) 5 N.L.R.61.

should be retained by the family for as long as possible. In order that his intention may be given effect, he may stipulate the condition under which a member of the family may continue to participate in the common use and enjoyment of the family property. In the wills containing conditions governing members' rights, the requirement for members' continued use of family property has been good behaviour; and especially, non-insistence on the sale or partition of the joint property. In Balogun and anor. v. Balogun and ors.<sup>1</sup>, the will contained clauses disinheriting any child of the testator who became quarrelsome or caused litigation; or, who insisted on partition of the family house. Similarly, in Ayoola and ors. v. Folawiyo and ors.<sup>2</sup>, the relevant clause in the will provided that:

"should any of my children demand a partition or sale of any of the said properties, I desire that he or she be at once disinherited by my Trustees of his or her share in my properties." (3)

#### Testator's nomination of his successor

As already noticed, a testator may, if he was also head of the family, nominate his successor in the will by means of which he has established family property. It will be recalled that the testator in Sogbesan and ors.

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1 (1935) 2 W.A.C.A.290.

2 Ayoola and ors. v. Folawiyo and ors. (1942) 8 W.A.C.A.39.

3 (1942) 8 W.A.C.A.39, at p.40.

v. Adebiyi and ors.<sup>1</sup> appointed his brother as head of the family instead of his eldest surviving son, who normally would have succeeded him. It is thus clear that the creation of family property by will may afford the deceased an opportunity of varying the normal rules of succession to the headship of the family.

(3) Interests known to both English law and customary law-gift or legacy

Hitherto, the discussion has been concerned with interests (created by wills in English form) known strictly only to either English law, such as the trust; or only to customary law, such as the family property. It must have been apparent from what has gone before, that in most cases in which a trust is constituted, and in all cases in which family property is created, there is not one beneficial owner absolutely entitled; but the property is devised or bequeathed so as to be enjoyed by a number of persons either concurrently or in succession.

In a few number of instances, however, there have been testamentary gifts of property in respect of which the donees' interests have been absolute and individual in nature. But there has also been one instance where the testamentary gift has been subject to a condition precedent. It will have been observed that testamentary gifts of

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1 (1941) 16 N.L.R.26.



property owned personally by a testator can be made by him under customary law. In the field of testamentary gifts or legacies, therefore, wills in English form and those made in accordance with customary law have been used in creating interests mutually known to both systems of law.

Cases involving gifts made by wills in English form

In Adedoyin v. Simeon and ors.<sup>1</sup>, the testator, by his will, made an absolute gift of the proceeds of his real property (which he directed his executors to sell) to his four daughters; three of whom were born to him by one woman and one by another woman. One-half of the proceeds was to be given to the one daughter having a different mother, while the other half was to be divided equally among the other three daughters. The daughter entitled to one-half of the proceeds of the sale of the property died intestate and without issue before the sale of the property was effected. The plaintiff was her mother and she claimed her deceased daughter's half-share in the property, on the ground that she was entitled under customary law. The defendants were the three half-sisters of the deceased daughter and they claimed to be entitled on two grounds. First, that as the property had not, in

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1 (1928) 9 N.L.R.76.

fact, been sold when the plaintiff's daughter died intestate and without issue, her one-half share in the proceeds of the sale lapsed into the residue for their benefit. Second, and in the alternative, whether English law or customary law governed the succession, the property of the deceased daughter passed to her brothers and sisters, whether these be of full blood or half-blood.

Combe, J., received expert evidence of the relevant customary law (Yoruba customary law) which established that the property of a daughter dying intestate and without issue passed to her mother, to the exclusion of the deceased's brothers and sisters of the half-blood. Accordingly, he decided that the plaintiff was entitled to receive her deceased daughter's one-half share of the proceeds of the sale of the property as devised.

In Alake v. Halid and anor.<sup>1</sup>, the testamentary gift was made subject to a condition precedent. There, the testator devised certain land to trustees upon trust to apply the rents and profits therefrom as to one-half towards the repair of the property; and as to the other half towards the maintenance of his son and daughter in equal parts. He also provided that if his son or any of his son's children should, during their lifetime, erect at

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1 (1935) 12 N.L.R.22.

their own expense "a solid and brick building and dwelling house" on a portion of the devised land, then that portion should be conveyed absolutely to the son or any of the son's children fulfilling that condition.

During the lifetime of the testator's son and before he had time to erect on the land the type of building contemplated by the testator, the Lagos Executive Development Board (a sort of town planning authority) acquired the land in question and paid the trustees compensation in respect of the acquisition. Later, the testator's son died intestate and without issue; whereupon the trustees were sued for his share of the compensation by his mother, the plaintiff in the case.

Graham Paul, J., dismissed the plaintiff's claim on two grounds. Firstly, the vesting of the gift of portion of the land was conditional upon the erection thereon of a solid brick building by the plaintiff's son. This he failed to do in consequence of which he had no vested interest in respect of the portion of the land devised. The fact that the acquisition of the land during his lifetime subsequently made it impossible for him to fulfil the condition was immaterial. Secondly, even if the gift could be held to have vested in the plaintiff's son, she had no right to sue without having obtained letters of administration; she being not a direct beneficiary under the

will, but someone claiming as the next-of-kin of her deceased son.

A testamentary gift may be made to take effect when the donee attains a specified age. In such a case, the rule is that the gift vests in the donee at the date of the testator's death, subject, however, to divestment if he (donee) should fail to attain the specified age. The notion is that the time element is introduced not for the vesting of the gift, but for the purpose of its enjoyment. This proposition of law is clearly brought out by the case Bickersteth and anor. v. Shanu<sup>1</sup>, which went to the Privy Council. In that case, the testator, by his will, appointed the appellants to be his executors and trustees. He bequeathed some twenty-one legacies, including one of £1,000 to his son and another of £400 to his daughter; directing that the legacy to the son should be deposited for him in a bank until he attained the age of twenty-five years. He then devised certain properties to the son, the respondent, with a direction that "these devises shall take effect upon my said son attaining the age of twenty-five years".

On attaining the age of twenty-five the son brought this action against the appellants, claiming an account, as from the date of the testator's death, of the rents of

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1 [1936] A.C.290.

the properties devised to him by his father's will.

The question to be decided depended upon the meaning to be put on the words "shall take effect upon my said son attaining the age of twenty-five years". Did they vest the devise of the properties in the son at the death of the testator, subject to divestment should he fail to attain the age of twenty-five years? Or, did they make the vesting of the devise contingent on the son attaining that age? Both the Divisional Court and the Supreme Court of Lagos decided in favour of the first view, that is to say: the devise vested in the respondent at the death of the testator, subject to being divested if he should fail to attain the age of twenty-five years. The executors and trustees appealed to the Privy Council.

The Board affirmed the decisions of both the Divisional Court and the Supreme Court of Lagos on two main grounds. Firstly, it was the established rule for construing devisees that they were to be held vested unless a condition precedent to the vesting was expressed with reasonable clearness; which was not the case in the instant devisees. Secondly, on a true construction of the will as a whole as well as on a consideration of the circumstances in which it was made; and applying the rule of construction referred to above, their Lordships were of the opinion that the words "shall take effect..."

related to the devise taking effect in possession, and were not intended to impose a condition precedent on the vesting of the devise. Their Lordships were considerably influenced by the comparison between the vesting of the legacy of £1,000 also made to the son and that of the devise, the subject-matter of the dispute in this case; and the consequences of holding that the rents of the property until the respondent attained the specified age would pass as on intestacy, when neither the respondent nor his sister would derive any benefits from such rents. As regards the legacy to the son, this was to be deposited in a bank until he attained the same age; but his vested interest therein was not contingent upon his attaining that age. It was merely to prevent his enjoyment thereof until he attained this responsible age. From this, the Board inferred that the object of the testator with regard to his son was "not to prevent him having any estate in the real property unless and until he should attain the age of twenty-five years, but rather to postpone his enjoyment, and if possible to prevent him from misapplying the property before he was twenty-five." (1)

#### FUTURE POLICY IN REGARD TO WILLS IN SOUTHERN NIGERIA

As will have been gathered from what has gone before, the present law of wills in regard to the admission to

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1 Ibid, at p.299.

probate of written customary wills (even in customary courts) is a matter of some uncertainty. The powers of Nigerian testators to disinherit even their sole or principal heirs, when wills in English form are used, are in direct conflict with the provisions of the customary law. The exercise of the deceased's testamentary powers in this way is unjust and unfair particularly to the customary heirs, not to mention the position of the wives of the deceased; especially when it is realised that we are concerned with an area where no law relating to family provision exists.

The above are some of the matters which should be a field for early legislation. They may be set down for brief remarks as follows:-

(1) Customary wills

A simple form of recording customary wills, and a simple method of proving such wills are required. It is, of course, true that traditional customary law knew of no writing. But, in these modern times, it may be provided that the traditional oral declaration should be recorded at the time <sup>it</sup> is made; it should be signed or marked by the person making it, and attested to by at least two witnesses, one of whom must be a member of the maker's family. It may even be necessary to legislate in connection with the admissibility of oral declarations of intentions concerning the testamentary dispositions of property; and

to provide that they should rank as a will in writing if made by a person on his death-bed, and when incapable of making a normal written will. As regards witnesses to such oral declarations, it should be provided that at least three witnesses to such oral declarations, including the testator's sole or principal heir, must be present.

As regards proof of written customary wills, there is no reason why the Courts, both the English and Superior Courts and (especially) the customary courts, should not be empowered to grant probate of such wills complying with the provisions suggested above. In the case of customary wills in the form of oral declarations made in the circumstances indicated, "probate" should be granted in respect of them in all courts, subject to adequate proof by persons witnessing them.

(2) Wills in English form

Provision should be made for the alteration of the general law relating to wills in order to make the requirements of a valid will in English form approximate, if not conform, to the suggested requirements of the customary law. In particular, the general law should be modified so as to admit as a will (and not merely as evidence to be lightly treated), a "death-bed" declaration on satisfactory proof



of the circumstances necessitating the making of such a declaration.

(3) Family provision

It will have been observed that under the existing law governing wills a testator may leave away all his property from his family; except that under customary law, certain specific items of his property may, in general, be reserved for his sole or principal heir. This raises the question of imposing some restrictions on the testamentary powers of the deceased. Legislation may be initiated to ensure that a fixed portion of a man's estate is left to the members of the family, especially those of the immediate family towards whom he had the duty of maintenance while he was alive.

RELEVANT LEGISLATION ENACTED IN MALAWI

Commendable steps have already been taken in Malawi in connection with most of the reforms suggested above. Under its recent Wills and Inheritance Ordinance, 1964, Malawi has provided an example of how the procedure for the making of wills may be simplified; and how the testamentary powers of the deceased may be restricted in order to ensure that if he fails to make adequate provision for his family, the court will put matters right on application being made to that effect. These Malawi

provisions are discussed in a recent issue of the Journal of African Law, to which the reader is referred<sup>1</sup>. Only a summary of the various provisions is attempted here.

### The requirements of a valid will

Every will must be in writing in duplicate<sup>2</sup>, one copy of which must be lodged in the local court exercising jurisdiction over the area of the testator's normal residence<sup>3</sup>. It must be signed by the maker and at least two witnesses attesting in the presence of each other<sup>4</sup>. One of the witnesses must be a close relative of the testator and, in the case of a married man, the other must be a person who witnessed the testator's marriage<sup>5</sup>. A witness must not be a beneficiary under the will, or someone under the age of eighteen<sup>6</sup>.

### Oral wills

There are also provisions authorising the making of oral declarations of intentions concerning the dispositions

1 Durand, P.P., "New provisions for the making of wills and inheritance by intestate succession in Malawi" [1964] J.A.L.109-113.

2 The Wills and Inheritance Ordinance, 1964, (Malawi), No. 36 of 1964, s.5(1). The enactment is also known as Kamuzu's (i.e. Dr Banda's) Mbumba (i.e. sisters) Protection Ordinance.

3 Ibid, s.5(5).

4 Ibid, s.5(2).

5 Ibid, s.5(4).

6 Ibid, s.5(3).

of property on death. To be valid, such declarations must be made in the presence of at least three witnesses, by a person "in imminent prospect of death and when incapable of signing a will".<sup>1</sup> The local court is then empowered to receive evidence in proof of such declarations from the witnesses, and to give effect to the testator's wishes as expressed in such a declaration<sup>2</sup>.

#### Family provision

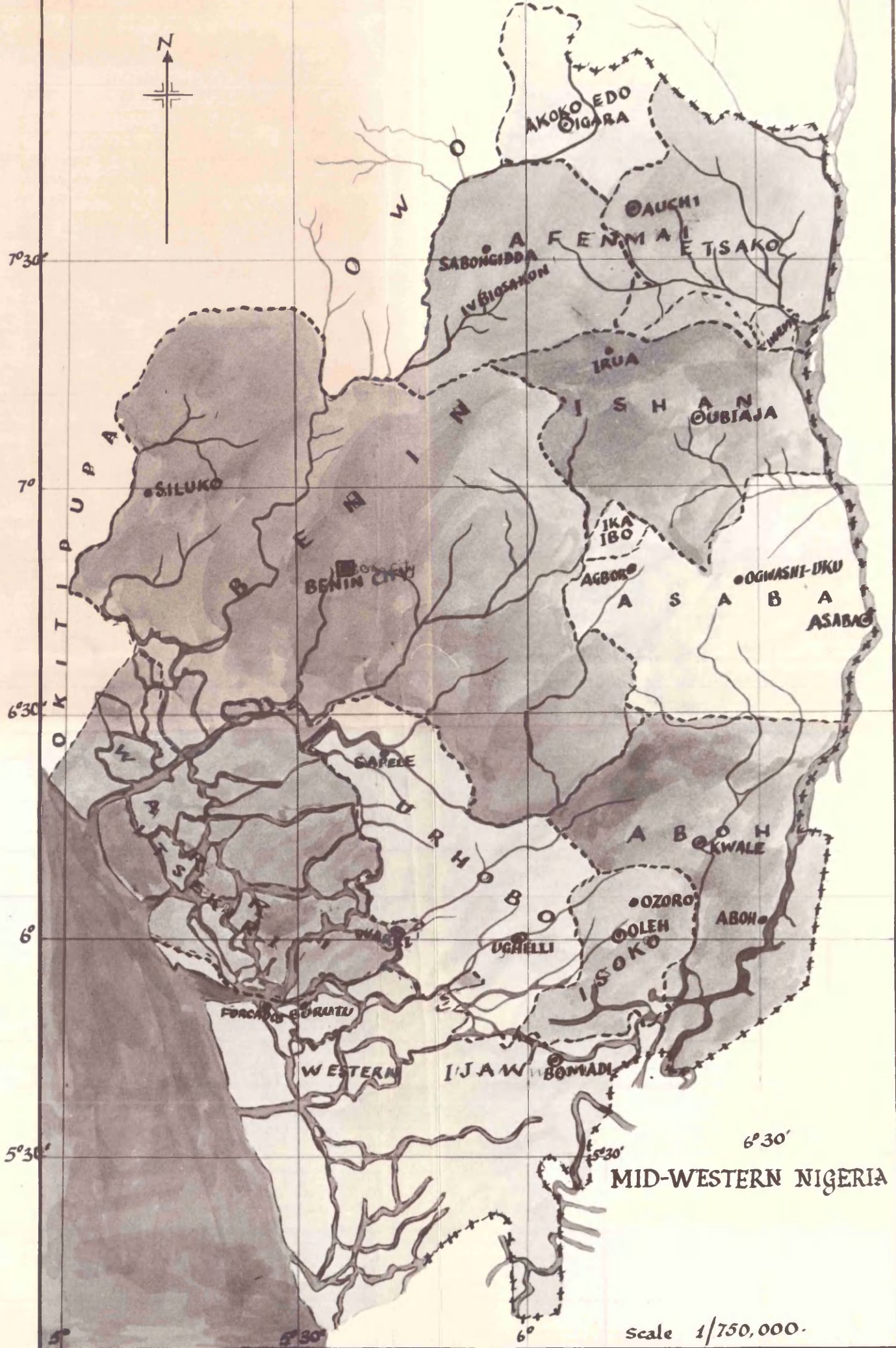
Section 10 of the Malawi Ordinance deals with the circumstances under which family provision may be ordered by the local court. The deceased must have failed to make adequate provision in his will for a surviving wife, minor children or children of any age who by reason of some mental or physical disability are incapable of maintaining themselves. These dependants may then apply to the local court, in which a copy of the testator's will has been lodged, for an order that reasonable provision be made for their maintenance. Under the section, up to two-thirds of the deceased's property passing under his will may be ordered by the court to be distributed among the dependants in accordance with the provisions of the Ordinance governing intestacy.

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1 Ibid, s.6(1).

2 Ibid, s.6(2).

It is to be hoped that this progressive step of the Malawi government will be followed by the various governments within our area of general reference; and that legislation will be initiated, without undue delay, modifying the law relating to wills on the topics raised. This is today, more than ever before, a field which must be looked into as a matter of urgency - and for good reasons. Firstly, the increased mobility of the population, sometimes resulting in the virtual break-up of the family as known to the African; the rising standard of education and general enlightenment of the people; together with the effects that these have on the process of the "individualisation" of property, are factors likely to encourage rather than discourage the tendency on the part of testators to dispose of their estates to the detriment of their families. Secondly, the injustice and hardship that may be caused to disabled and yet disinherited dependants may well be imagined, when it is realised that there is at present an almost complete lack of social and welfare services catering for such luckless and less privileged members of the society.





Customary Courts: Western Region of Nigeria  
In the Warri Divisional Grade 'B' Customary Court  
Holden at Ekurede-Warri Saturday the  
4th day of June, 1960, Before the Presi-  
dent Chief Utieyin E. Onuwaje.

GBC/5E/60: In re Chief Eyenomuro Fregene: Deceased.

In the matter of application for Certificate of Inheritance filed by:

1. Madam Ekunkubo Fregene-Sister of deceased
2. Anthony Ogbitse Fregene-2nd Son of deceased.
3. Alexander Obogu Fregene-Nephew of deceased.

1st and 2nd Applicants only are present.

3rd Applicant is absent.

1st Applicant sworn on matchet states in Itsekiri: My name is Ekunkubo Fregene female Adult Itsekiri petty trader residing at Ogbe-Sobo. I am the elder full sister of Eyenomuro Fregene male Adult Itsekiri launch transport owner who died at Warri on Saturday the 28th day of May, 1960. At the time of his death his fixed place of abode was at No. 16 Ginuwa Road, Warri. The late Eyenomuro Fregene (m) is survived by Enerunmotsagha (f), Unuarere (f) Abiekunogho (f) deceased, Grace (f) Christiana (f) and one other wife whose name I do not now remember. I now remember the name of another wife which is Esanjumi (f) who is deceased. All the wives, except Christiana, were married according to native law and custom. My deceased brother is also survived by fourteen children namely, Orode (f) aged about 32 years, Ejutemeden (m) 29 years, Ogbitse (m) 25 years, Egeyin (f) 22 years, Otsemaye (f) 20 years, Mayuku (f) 19 years, Matem (f) 18 years, Agbukutsere (m) 15 years, Oforitselaju (f) 12 years, Ayaghanroro (f) 6 years, Odemi (f) 7 years, Oritslumewo (m) 5 years, Omatie (f) 3 years and the last born (Odubi) not yet named, only 8 months old. Matem lives with her mother, Enerunmotsagha, the father and mother of deceased died long before him. ~~The~~ The deceased has no brother living and I am the only the surviving elder sister. I want this Court to grant the second son, his nephew Alexander Obogu Fregene and me a certificate of inheritance to enable us not only to inherit but also to administer the estate of my deceased brother according to Itsekiri customary law.

Examined by Court: Alexander Obogu Fregene is a son of one of the many half - brothers of the deceased. The first son happens at present to be of unsound mind. I include the third applicant to represent the interest of the Fregene family - that is the family comprising the half brothers and half-brothers of the deceased.



My name is Anthony Ogbitse Fregene male adult Itsekiri Bank Clerk employed by B.W.A.Ltd, Warri . All I would like to add to the statement of the first applicant is that I agree with the reason given for including the third applicant I would like Court to consider that point in relation to the interest of the beneficiaries of the estate and give its decision according to the best principles of customary law. The daughter, Ayaghanroro (f) lives with first applicant, Odemi, Oritselumewo (f) lives with her own mother. The last born (Odubi) also lives with its mother.

Ruling: Having heard the evidence of the first and second applicants, I am satisfied that the three applicants before me are, having regard to the interest of the beneficiaries of the estate of the deceased, namely, Eyenomuro Fregene late of 16, Ginuwa Road, Warri, and of the Fregenex family under Itsekiri customary law entitled to inherit and administer the estate of the deceased. I therefore order that Certificate of Inheritance do issue to them accordingly.

(Sgd) U.E.Onuwaje  
President, 4/6/60.

At Ekurede-Warri Wednesday the 14th day of Sept. 1960  
Before the President Chief Utilevin E. Onuwaje.

GBC/5E/60: In the matter of Eyenomuro Fregene: deceased  
In re Certificate of Inheritance granted on 4/6/60 to Ekunkubo Fregene (f) and two others (m).

In the matter of motion of Jemigbeyi Fregene and 4 others for removal of the second person, son of the deceased, from among those to whom Certificate was granted and for appointment of another person in his place.

Applicants are all present.

Respondent, Anthony Ogbitse Fregene, sought to be removed, is also present. Applicants file joint affidavit and respondent files Counter-affidavit opposing application.

Note: Both affidavit and counter-affidavit read over and interpreted to both parties in the Itsekiri language by me.

Order: I can see nothing in the affidavit of the applicants to justify removal sought. Application is therefore refused. I make no order as to costs.

(Sgd) U.E.Onuwaje  
President, 14/9/60.

*5/- Copy fee charged  
for 4 folios and part  
thereof vide CRA 279279  
3/6/63.*

*certified true copy*  
*David A. A. A.*  
Acting Registrar  
Warri Divisional Grade (B) Customary Court  
Warri 28/5/63.



- 1 -

In the Customary Courts of the Western Region of Nigeria.

In the Central Urhobo Grade 'B' Customary Court before:-

E. A. Ono.....President.

M.O. Odecca.....Member.

Tuesday, the 29th day of August, 1961.

Court Inquiry: Re-Certificate  
of inheritance to Estate of  
late Omoko Ziregbe.

Complainant/Applicant sworn on the Holy Bible states in English language:-

I am Kacaulu Omoko Ziregbe, the eldest son of late Omoko Ziregbe; my late father has a saving Bank Account in the B.W.A. Ltd., Warri. I am here applying to the Court for a certificate of inheritance; as to enable me recover the saving from the Bank, which I have already owned through the right of inheritance according to native law and custom, by the members of our family. The saving account is about ₦210.

xx d by court:-

Yes; I am here with my paternal uncle and a paternal cousin in person of Chief Apute Ziregbe and Ametore Ovhima respectively.

Chief Apute Ziregbe sworn on machet states in Urhobo language:-

I am the direct brother of late Chief Omoko Ziregbe of Ewu, and the complainant is the eldest son to him (my late brother) to whom, we the members of our family have administered the saving account of the late father now in the B.W.A. Ltd., Warri, and wish that a certificate of inheritance be given him (complainant) to enable him recover the said money.

...../2



- 2 -

xx. by court:-

Anretoro who is also a member of our family now present in court was also present during the administration of the said estate.

The deceased had other children comprising of boys and girls.

The complainant is to use the money, if recovered, in bringing up the young ones left behind by their father.

Note:- Anretoro Ovhiema called by court to questions and he confirmed the statement of Chief Apute Ziregbe.

Court:- As per the evidence adduced before this court it could be believed that the complainant (Macaully Omoko Ziregbe) is a fit person to be entitled to the Certificate of inheritance which he now applies for.

Order:- Application is hereby granted.

(Sgd) E. A. Ono.  
President. 29/8/61.

(Sgd) M. O. Odecca.  
Member. 29/8/61.



CERTIFICATE OF INHERITANCE.

No. 2/61.

Pursuant to the enquiry held on the 29th day of August, 1961, and in accordance with the powers vested on this court <sup>Ughelli</sup> (Central Urhobo Grade 'B' Customary Court), by ORDER 17 Section 8, Part A of the W.R. Customary Court's Law 1957, one Mr. Macaulay Omoko Ziregbe (m) of Ewu Town is hereby declared under Customary Law to inherit the personality and reality of the late 'Omoko Ziregbe' of Ewu Town.

Dated at Ughelli this 29th day of August, 1961.

(Sgd) E. A. Uno.  
President,  
Central Urhobo Gd. 'B' Cust. Court,  
Ughelli.

16/-

(Sixteen shllrs.)

Fees collected: C.R. 29/565382 of 29/8/61.

(Sgd) A.A. Usenu.  
S. C. C.C.

*certified true copy:*

*5/ (Five shllrs)  
fees collected  
C.R. 15/8506915 of 8/10/63  
B.*

*Ughelli  
Grade 'B' cust. Court  
8/10/63*



CIVIL CASE NO. 1084/59

Ephraim Ochonma of Aro Umuonasi  
Vs  
Vincent Ochonma (m) of Aro Umuonasi

£1 : 5/- Copy of 609 words at 2/6d  
per 100, plus inspection fee 7/6d  
Vide GCR 5767 of 10/10/63.

Claim: To declare  
in Court that Plaintiff  
is the next-of-kin to  
the deceased Uriah  
Ochonma of Aro Umuonasi  
working under the P.W.D.  
Port Harcourt before he  
died as a result of Car  
accident in the General  
Hospital Port Harcourt.  
Cause of Action arose  
2 months ago.

BOTH PARTIES PRESENT

Plea Claim admitted by the Defendant.

Plaintiff Ephraim Ochonma s/s:-

My name is Ephraim Ochonma, a native of Aro Umuonasi working in P.W.D. Port Harcourt. The deceased Uriah Ochonma is my brother of the same parent. He has no other succeeding son or daughter to inherit his estate or property than myself. He was working under the P.W.D. Port Harcourt before he died two months ago. The Defendant is also the head of our family I took this action against him to declare in this Court that I am the next-of-kin to the deceased Uriah Ochonma and no other person else. My brother Obasi Ochonma will also give evidence to confirm my statements.

Witness Obasi Ochonma for Plaintiff. s/s:-

My name is Obasi Ochonma, a native of Aro Umuonasi. I am a contractor working in the Shell Residential Area Umukoroashe. Late Uriah Ochonma is our brother. In our family, the Plaintiff is the only man who is the next-of-kin to the deceased, and he is only entitled by Custom to inherit the deceased property or estate. The whole members of our family are in favour of Plaintiff's action as regards to his claim to prove that he is the next-of-kin to the deceased Uriah Ochonma.

Defendant Vincent Ochonma s/s:-

My name is Vincent Ochonma, a native of Aro Umuonasi, and a farmer. I am at the head of Ochonma's house. I admit the Plaintiff's claim, because he is the deceased brother of the same parents, and the next-of-kin to the deceased. Plaintiff is the only man in our family who is entitled to inherit the deceased estate and property. He is also entitled to claim any pension, salary or gratuity which may be paid to the deceased by the P.W.D. Port Harcourt. Apart from the Plaintiff no other man or woman in our family or house has any right over the property or estate of the deceased Uriah Ochonma.

Finding by Court

The Defendant admits Plaintiff's claim in full. From the evidence adduced by parties before this Court, the Bench is satisfied that the Plaintiff is the next-of-kin to the deceased Uriah Ochonma. Therefore Plaintiff is entitled to the deceased estate and property. He is also to claim from the P.W.D. Port Harcourt any salary, gratuity, pension if any, and any other death benefits due to the deceased.



- 2 -

JUDGMENT.

For Plaintiff for £2 Cost.

Plaintiff is now the next-of-kin to the deceased Uriah Ochoroma. He is also legally and naturally entitled to the deceased property or estate his salary for the month in which he died, his gratuity if any, and any other benefits due to him before his death.

1. Signed Chief P. Iroanya
2. Signed Chief W. I. Aka
3. R.T.I. Chief Amadi Okacha

10/9/59

W/M. Signed I. K. Ogundu C.C.



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